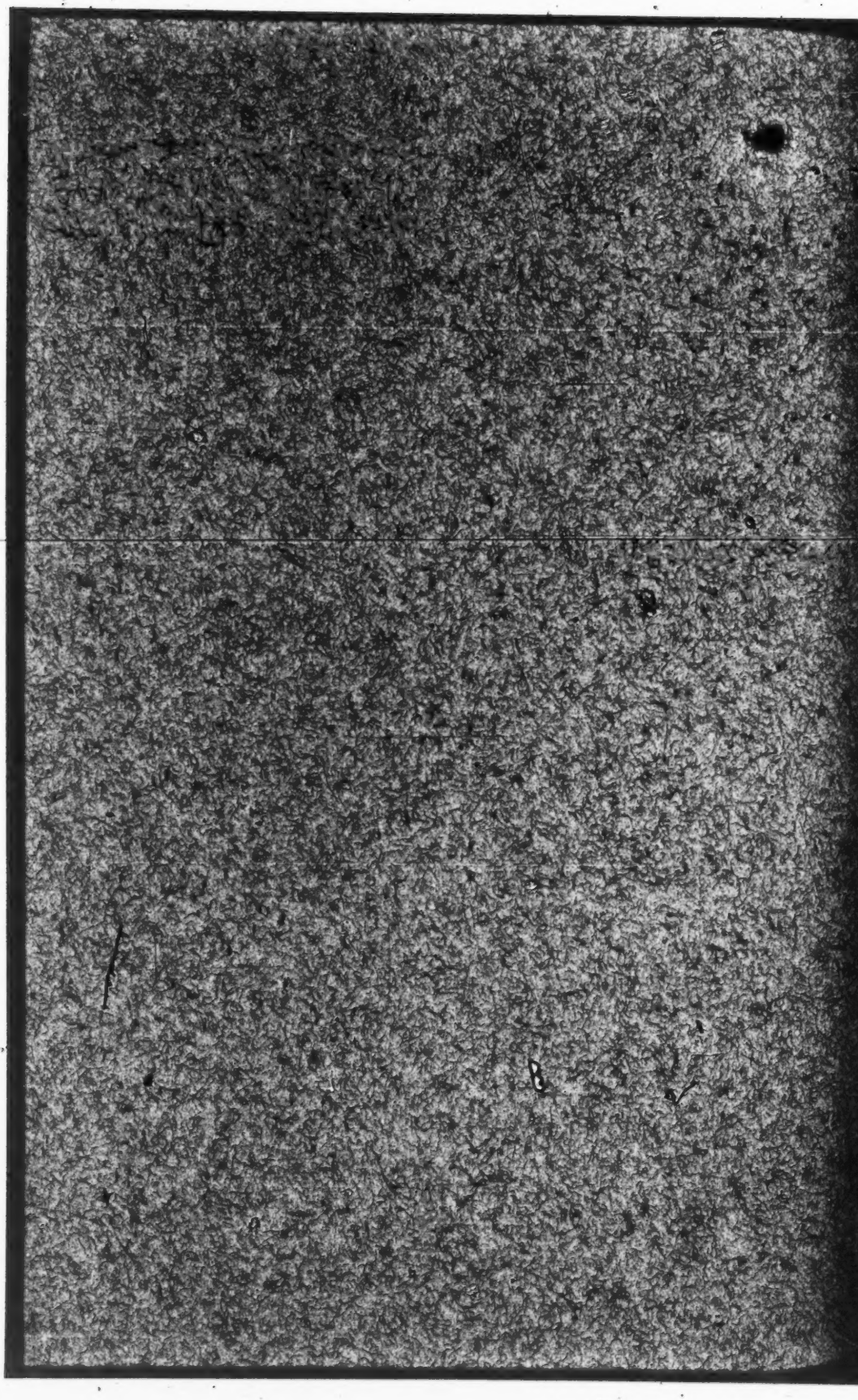


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 937

THE COLUMBUS GAS AND FUEL COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO AND THE CITY OF COLUMBUS, OHIO,
Appellees.

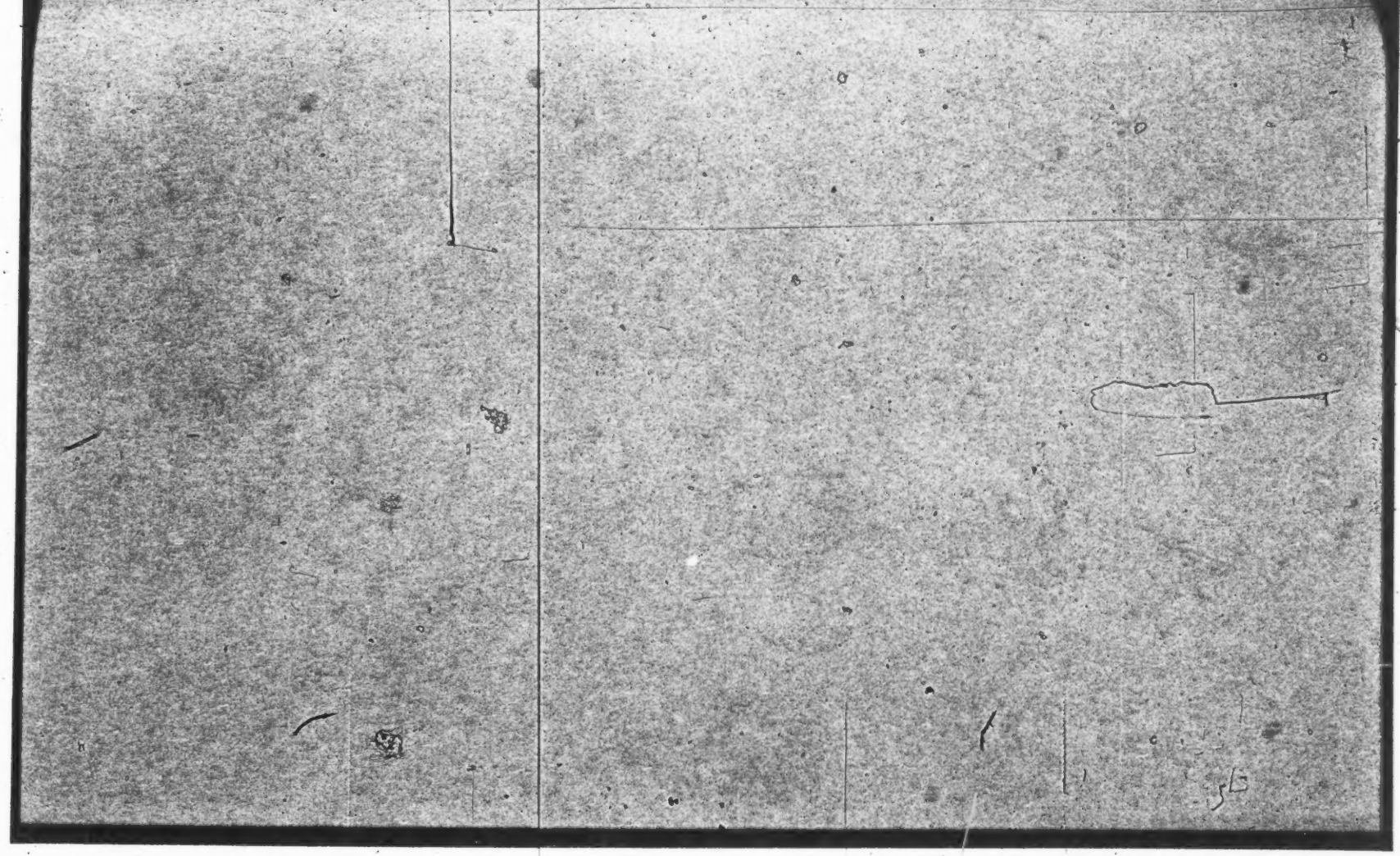
Appeal From the Supreme Court of the State of Ohio.

REPLY BRIEF OF APPELLANT.

EDWARD C. TURNER,
ALBERT M. CALLAND,
Counsel for Appellant.

Columbus, Ohio, March 10, 1934.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 608.

THE COLUMBUS GAS AND FUEL COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO AND THE CITY OF COLUMBUS, OHIO,
Appellees.

Appeal From the Supreme Court of the State of Ohio.

REPLY BRIEF OF APPELLANT.

SUMMARY OF REPLY ARGUMENT.

1. In respect of gate price for natural gas appellant is asserting confiscation in its own right as it will be compelled to pay The Ohio Fuel Gas Company either the con-

tract price, a fair market price, or a reasonable price therefor. Neither of these bases was allowed.

2. No error was predicated upon the disallowance of fees paid to Columbia Engineering and Management Corporation. These fees were reduced to cost of services.

3. The operating expenses allowed are inadequate. The operating expenses and return here allowed amount to $154,287.00 per year less than the operating expenses and return allowed by the United States District Court as of August 31, 1925—when appellant's plant was much smaller and its assumed sales almost 10% greater.

4. The Federal Gas & Fuel Company has no place in this appeal and the discussion of it here is inappropriate.

5. While the commission reduced The Ohio Fuel Gas Company's payments to The Preston Oil Company $76,363.00 per year in arriving at the gate price, The Preston Oil Company was not shown to have had any net profit for the year used in ascertaining said gate price.

6. The production of gas by the so-called "independents" is largely a by-product. Their entire production is less than 14% of The Ohio Fuel Gas Company's maximum demand over a three year period. Independents maintain no gas reserves and give no assurance of continued supply. The major cost of natural gas production and transmission is due to the necessity of maintaining standby facilities to meet the maximum demands of severe weather.

7. 6½% return is insufficient to provide a sound basis

for either bonds or stocks of a natural gas production, transmission or distribution company. Leaves nothing for surplus. Credit cannot be maintained. Money necessary for the proper discharge of public duties cannot be raised.

8. There can be no question about the court having disallowed amortization. The court below said:

> "But we just cannot read amortization into the law of Ohio."

9. The court below definitely reversed the commission for allowing depletion of wasting assets. No depletion was allowed by the minority commissioner. No depletion is possible under the 48 cent rate.

10. Appellant's depreciation reserve is insufficient to write off either its artificial gas mains, for which no value was allowed, or the shrinkage due to the decreased value allowed herein for appellant's plant.

While the United States District Court found the value of appellant's plant as of August 31, 1925, to be $3,976,359.00 (R., 3006A), and while appellant has since added to its plant net additions at cost, with overheads at the rate allowed by said court, to represent a total present value of $5,354,317.27, the commission and court below allowed a value for appellant's plant of only $4,027,647. (R., 182, 220.)

11. The West Virginia Public Service Commission has abandoned the depletion method of gas well depreciation in conformity with the holding of the Supreme Court of

Appeals of West Virginia. While such method of depreciation might be proper in a case where the value of the gas wells was based upon the gas content of the fields, it is not proper where reproduction cost is ascertained without reference to the gas content.

12. The evidence as to value of operated gas leaseholds, Class No. 1, meets every reasonable test of what a willing seller would take and what a willing buyer would pay.

13. No value of any kind was allowed for reserve gas leaseholds. No question was raised as to the amount of reserves being carried. The city is mistaken in claiming that The Ohio Fuel Gas Company made a net surrender of leaseholds in 1930. No gas producing and transporting company can be financed or conducted without reserve leaseholds.

14. We were in error in our opening brief both as to the amount of cost of organization found by Ford, Bacon & Davis for The Ohio Fuel Gas Company and as to the purported allowance therefor by the minority commissioner. We correct this statement and apologize for the mistake.

15. The incomplete construction or work in progress disallowed was expended principally for new gas wells, which would necessarily have to be used during the term of the ordinance.

16. In the matter of going concern value we agree

with the statement of counsel at page 68 of city's brief, wherein they say:

> "The fact that what was actually going concern value in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element."

We challenge anyone to find any going concern value in the rate bases in this case. Going concern value was definitely disallowed.

17. The evidence clearly shows and the Public Utilities Commission, possessed of competent engineering advisers, unanimously found that the plan of allocation ordered by the court below is impossible of application. Such plan attempts the dismemberment of The Ohio Fuel Gas Company because of the fact that the same holding company owns the stock of both appellant and said Ohio Fuel. The proposed plan attempts to allocate value and expenses according to a hypothetical yardstick having no basis in fact, and without regard to the method by which said company is operated. When appellant is called upon to account for the payment for gas delivered by The Ohio Fuel Gas Company it cannot lawfully insist upon such plan of allocation in arriving at a reasonable price for such natural gas.

18. Of the foregoing subjects, (1) Columbia Engineering and Management Corporation, (7) Rate of Return, (10) Depreciation, (16) Going Concern Value are common to the two questions:

(a) The proper allowance to appellant for the gas purchased at the city gates, and

(b) Appellant's distribution expenses and the valuation of appellant's plant.

Of the following subjects, (21) Overheads, (22) Working Capital, (23) Taxes are also common to both questions. The remaining subjects, down to and including (26) Collar Leak Clamps, apply to appellant's distribution plant and expenses.

19. Depression labor costs and erroneous labor performances were used, resulting in the depreciation of appellant's plant in an amount at least 25% below the cost of reproduction new less depreciation.

20. The gas holder, for which no value was allowed, is actually used and useful as shown by the records of the use thereof.

21. General Overheads are expenses which are necessarily incurred in the construction or reconstruction of a public utility plant.

22. It was assumed that because of the fact that appellant purchased its gas from a related company, The Ohio Fuel Gas Company, that appellant did not need any working capital for such purchases. It was further assumed that because The Ohio Fuel Gas Company purchased part of its supply from another related company that for this purpose The Ohio Fuel Gas Company needed no working capital.

23. The city is assuming that taxes are going down. We are complaining that the commission refused to make an allowance for excise taxes actually increased by law.

24. The commission denied actual and necessary load building expenses, which the city erroneously argues were expenses incurred in the sale of appliances.

25. Gas sales and lost gas: While these points were included in our assignment of error, they were not included in the specification in our opening brief of errors to be relied upon. All of our computations in our opening brief are based on the gas sales and lost gas computations introduced by the city and used by the commission, and presumably by the court below.

26. Collar leak clamps were not included in the rate base. They do constitute a necessary and continuing expense, for which no allowance was made.

27. As to due process, counsel for the city seem to misunderstand this subject and appellant's right to have the question of confiscation determined by the independent judgment of a court of competent jurisdiction.

While we believe that the statutes of Ohio do confer the necessary jurisdiction, as stated by the Court of Appeals in the case of **Van Wert Gas Light Co. v. Public Utilities Commission**, 299 Fed., 670-674, and are similar to the statutes of Pennsylvania considered by this Court in the case of **Ohio Valley Water Co. v. Ben Avon Borough**, 253 U. S., 287, yet borrowing from the language of Mr. Justice McReynolds, in the Ohio Valley Water case, supra, (p. 289).

> "Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal."

ARGUMENT.

1. OUR STATUS RE GATE PRICE.

At page 20 of the city's brief it is said:

> "In complaining of the allowance for the cost of purchased gas the appellant cannot here assert the constitutional rights of Ohio Fuel and United. The question is, what the appellant should pay for gas during the life of the ordinance."

We have assumed in our assignments of error and in our brief that the question pertaining to purchased gas (other than the contract price) is, what should appellant be allowed as a reasonable cost for gas purchased during the life of the ordinance?

At page 27 of our opening brief we said:

> "I. Appellant complains of confiscation because in computing the rate which it may charge for natural gas delivered to consumers in the city of Columbus, it was not allowed in operating expenses either the contract price, a fair market price, or a reasonable price for the natural gas which it must purchase at the city gate."

We are here discussing only the gate price allowance for purchased gas, and take the position that The Ohio Fuel Gas Company can recover either

(a) The contract price, or

(b) The fair market price, or

(c) A reasonable price.

While the judgment of the court below is res adjudicata, unless reversed, as to the amount which appellant may charge for natural gas distributed to consumers in the city of Columbus, yet The Ohio Fuel Gas Company is in nowise bound by the judgment of the court below, and may recover from appellant on at least one of the foregoing bases for the natural gas delivered to appellant at the Columbus gates. Thus appellant is being deprived of its property without due process of law unless it is allowed as much for its purchased gas as the Ohio Fuel could recover therefor.

At page 13 of our opening brief we said, and here repeat:

> "Whether the Supreme Court of Ohio disregarded corporate entities or followed the commission's treatment is not clear from the court's opinion. . . . . "

And at page 27 of our opening brief, in opening our argument, we said:

> "Our argument will apply equally whether the properties and expenses of the natural gas producing and transporting companies be considered as separate units or as a single unit of which appellant is a part. This for the reason that the valuation and expenses of the supply companies must be found and apportioned to the city of Columbus under any method of allocation or rate-making."

Counsel for the city have not aided us any in the solution of the manner in which the court below did treat the affiliated companies. While the above quotation appears

at page 29 of the city's brief, yet at page 82 of the same brief it is said, under their argument on working capital:

> "The Columbus company and Ohio Fuel units are a part of the 'Columbia system.'"

It seems to us that on this question the city blows hot and cold throughout its brief.

Appellant is here attempting to assert its own rights on account of its liability to The Ohio Fuel Gas Company. But if it should be held, according to the opening paragraph in the opinion of the court below (R., 55),

> "The outstanding fact which must first be stated as underlying and conditioning every element involved in this controversy is, as stated in the 1931 annual report of The Columbia Gas & Electric Corporation, that all of the properties involved in this case are 'thoroughly integrated and interconnected, they constitute a single operating unit,'"

that the several companies whose capital stock is owned by Columbia Gas & Electric Corporation constitute but a "single interest," then by the same token appellant represents that interest here and can raise any questions involving any part of the "single interest."

We believe and contend that under the doctrine of **Smith v. Illinois Bell Telephone Co.**, 282 U. S., 133-144, and many earlier cases the stock ownership by Columbia Gas & Electric Corporation does not destroy appellant's distinct corporate identity, and that both the commission and the court below imposed its requirements on appellant only, as a corporation engaged in an intrastate public service and as such amenable to a valid exercise

of the commission's authority. (Smith v. Illinois Bell Telephone Co., supra, p. 140.)

We make this same contention as to all questions involved in the gate price, including the supply contract. (Co. Ex. 14, R., 2879.)

The Ohio Fuel Gas Company was not a public utility in respect of the sale of natural gas at wholesale to appellant. Section 614-2 (set out at pp. 284-285 of the city's brief) defines a natural gas company as one

> "engaged in the business of supplying natural gas * * * to **consumers** * * *."

See West Ohio Gas Co. v. P. U. C. O., 42 Fed. (2d), 898;

St. Clairsville v. P. U. C., 102 Ohio St., 574.

Neither **Newark Natural Gas Co. v. Newark**, 242 U. S., 405, nor **Public Utilities Commission v. Landon**, 249 U. S., 236, is in point here. In fact we here have the exact reverse of those cases in the matter of contracts. In each of those cases the contracts were relied upon. In the instant case the supply contract has been disregarded.

As said by this court, through Mr. Justice Pitney, in the **Newark case**, at page 408:

> "There is no contention that plaintiff in error could not operate profitably under the ordinance of 1911 so long as the contract remained in force * * * and the pertinent question is, what plaintiff in error would probably have to pay for gas during the life of the ordinance. The contract measured this so long as it continued in effect."

In the **Landon case**, this court, by Mr. Justice McReynolds, said at page 246:

> "The challenged orders related directly to prices for gas at burner tips and only indirectly to the receivers' business. **They were under no compulsion to accept unremunerative prices; even the original supply contracts had not been adopted and were subject to rejection.**" (Boldface ours.)

Neither does the case of **Western Distributing Co. v. Public Service Commission**, 285 U. S., 119, aid the city's position. In that case, as stated by the court through Mr. Justice Roberts at page 123.

> "The company declined to make any showing with respect thereto • • •." (The 40 cent gate rate.)

In the instant case appellant made full showing with respect to the gate price.

On the subject of gate price Mr. Justice Roberts further said (p. 124):

> "To this end the commission insists upon its authority to make such investigation as will satisfy it upon this point."

In the instant case the commission made full investigation.

At the bottom of page 124 and top of page 125, Mr. Justice Roberts said:

> "The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the

situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the commission to desist from all inquiry as to its fairness."

No such question exists in this case, because the state authority has made full inquiry as to the fairness of the gate price.

Mr. Justice Roberts further said (p. 125):

"The principles applicable in a rate investigation, where similar corporate relationship exists, were recently announced in Smith v. Illinois Bell Telephone Co., 282 U. S., 133, and no purpose would be served by repetition or elaboration of what was there said."

We have elsewhere used the Illinois Bell Telephone case as an authority for our position in respect of corporate identity, etc.

New Matters Injected by City.

The city in its brief has introduced five subjects which were not covered by any assignment of error and which were not argued in our opening brief. All of these subjects were, however, considered by the commission and all but The Federal Gas & Fuel Company were presented to the court below but not mentioned in its opinion, to wit:

The fees of Columbia Engineering and Management Corporation.

Engineering and Management Corporation.

Alleged exorbitant increase in expenses of appellant. The commission allowed, and the court below approved, an allowance of 16 cents per M c. f. as the cost of distribution, whereas the federal District Court had allowed 16.8 cents per M c. f. for a much smaller plant upon the assumption of greater sales than found by the commission.

The Federal Gas & Fuel Company.

The gasoline extraction and oil production earnings of The Preston Oil Company.

Purchased gas.

These will be discussed in the order above set out.

2. COLUMBIA ENGINEERING AND MANAGEMENT CORPORATION.

(City Brief, p. 122.)

As the commission reduced the payments to Columbia Engineering and Management Corporation to less than cost, and as no error was assigned for this action, a discussion of this company does not have a proper place in this case. However, as counsel for the city have discussed it on the apparent assumption that there might be a siphoning of profits through that source, we feel compelled to reply.

The majority of the commission said in respect of the so-called "management fee" (R., 169):

> "We have corrected this claim for expenses, allowing only that which we think would justly pay for the services actually rendered."

Engineering and Management Corporation.

The minority commissioner said in respect of the management fee for The Ohio Fuel Gas Company (R., 204):

> "I have further reduced the operating and engineering fees to a cost basis in the sum of $143,162, following the rule laid down by the Supreme Court in the Illinois Bell Telephone case hereinbefore referred to."

At Record, 211, in respect of the engineering and management fees for appellant, the minority commissioner said:

> "Under the decision of the Supreme Court in the Illinois Bell case this commission is authorized to determine the cost of the service rendered by the holding company to the subsidiary company. Company Exhibit 77 shows the approximate cost of the service rendered to the Columbus company to be $39,844.98, which amount is allowed as an item of expense rather than the 2½ per cent. item of gross income or the $17,644.45 contended for by the city."

This allowance by the minority commissioner was carried into Sheet 4 of his Exhibit "C" as Item 427½. (R., 222.) The identical allowance will be found in the majority's Sheet 4 of its Exhibit "C." (R., 184.)

In the minority's Sheet 4 of Exhibit "B" (Ohio Fuel expenses), Account 427½, the "operating and engineering service fees" is reduced to $186,736.00, which is the identical amount allowed by the majority in its Sheet 4 of Exhibit "B" (Ohio Fuel expenses). (R., 181.)

It will be seen therefore that the rate is based not on what the Engineering and Management Company's con-

tract called for, but the reduced allowances made by the commission.

The city paints an entirely misleading picture in respect of the so-called Columbia system's connection with appellant.

At page 113 of the city's brief it is said:

> "The Columbia system purchased the Columbus company in 1924. (R., 896.)"

There is not a single word at Record, 896, or for that matter any place else in the record, which supports this statement. Columbia Gas & Electric Corporation was not in existence at that time.

We do not see how the fact that the controlling interest in appellant's stock was sold several times has anything to do with this case. We might observe in passing that there is nothing to prevent Columbia Gas & Electric Corporation from disposing of appellant's stock, thus terminating relationship.

At page 122 of the city's brief it is stated that Columbia Engineering and Management Corporation was organized December 1, 1925. In City Exhibit 19 (original), the original contract between appellant and Columbia Engineering and Management Corporation was entered into on January 25, 1927, and these fees are limited to the years 1927, 1928 and 1929. Certainly whatever profits were earned by the Engineering and Management Corporation prior to 1927 can by no stretch of imagination have any effect upon appellant's rates from November, 1929, forward.

Engineering and Management Corporation.

The statement in the city's brief at page 125,

> "Since the company was organized at almost the close of the year 1925 we are speaking of five operating years, 1926, 1927, 1928, 1929 and 1930, * * *"

cannot be reconciled with City Exhibit 19 (original) and/or any testimony in the record.

The total management fees for 1927, 1928 and 1929 amounted to $230,225.36. If we substitute for this amount the annual allowance made by both the majority and minority commission in lieu of the management company fees, to wit, $39,844.98, for the three years it will amount to $119,534.94. Deducting this amount from the total amount of fees drawn in the three years leaves a difference of $110,690.42. For the same years, 1927, 1928 and 1929 appellant sustained a net deficit of $62,552.19. (R., 2897.) If we deduct from this deficit the excess of the fees over the commission allowance there would be a profit of $48,138.23, for the three years.

During all of these three years, except from and after July 1, 1929, when the new supply contract (Co. Ex. 11, R., 2879) was entered into upon the acceptance of the so-called "65-cent" ordinance, appellant was buying its gas under the 1914 contract and paying therefor 65 per cent of the 48 cent retail rate. (R., 2884.)

Assuming that the 1914 contract had been effective for the last half of 1929, appellant would have had a credit for gas purchased of $392,383.10. Adding the $48,138.23 to this (being the net profit left after taking off the management fees) would have shown a profit for the three years, 1927, 1928 and 1929, of $440,521.33.

Engineering and Management Corporation.

The annual return on the valuation found by both the majority and the minority of the commission (R., 182, 220) at 6½ per cent. amounts to $261,797.00, or for the three years $785,391.00.

With the assumed profit for three years of $440,521.33 arrived at by deducting all of the management fees for the three years except that part allowed by the commission, and by assuming that the 1914 contract cost of purchased gas continued without change through the year 1929, appellant would have earned at the 48 cent retail rate, the rate of 3.64 per cent. on the rate base fixed by the majority and minority commission, to wit, $4,027,647.00. (R., 182, 220.)

Subjected to another test: Taking the rate base fixed by the federal court (17 Fed. [2d], 638), (R., 3006A), to wit, $4,071,486.00, and disregarding entirely the $1,231,760.78 of net additions (R., 2898) made subsequent to the federal court valuation, eliminating all management fees and substituting therefor the allowance made by the commission, eliminating the 45 cent gate price and substituting therefor the 1914 contract price of 31.2 cents, there would have been under these assumed conditions a return to appellant on the 1925 valuation of 3.61 per cent. for the years 1927, 1928 and 1929.

However, if the net additions (R., 2898) be added in at cost, with the same overheads allowed by the federal court, the rate base as shown by Company Exhibit 186 (R., 3006A) would be $5,354,317.27 and the return under

the foregoing assumptions would have been 2.74 per cent for the years 1927, 1928 and 1929.

They say that the proof of the pudding is in the eating thereof. Here, certainly, is the proof that the 48 cent rate is confiscatory.

(The entire transcript of the federal court case was introduced before the commission as Company Exhibits 65, 66 and 67 and were admitted at page 5942 of the transcript below but not certified to this court. However, Company Exhibits 19 (R., 2898) and 186 (R., 3006A) contain all data necessary to support the foregoing statements. See also The Columbus Gas & Fuel Co. v. City of Columbus, 17 Fed. (2d), 630-638).

3. EXORBITANT OPERATING EXPENSES.

(City Brief, p. 112, et seq.)

Counsel for the city say at page 112 of their brief:

> "The Columbus company is hopelessly over-capitalized. It has outstanding securities as follows:
>
> | | |
> |---|---|
> | Preferred, 60,000 shares, par value | $6,000,000.00 |
> | Common, 30,000 shares, par value | 3,000,000.00 |
> | Bonds | 1,331,000.00 |
> | Total | $10,331,000.00" |

That is exactly what future city solicitors will be saying of The Ohio Fuel Gas Company if there is no amortization of its facilities allowed.

In the federal court case (The Columbus Gas & Fuel Company v. The City of Columbus, 17 Fed. [2d], 630-

637) approximately $1,500,000.00 of reproduction cost alone of artificial mains was disallowed.

At page 637 the court said:

> "The Columbus company contends that, if the valuation under the artificial main account was disallowed, then the company was entitled to consideration of the fact that more than $1,300,000.00 bonded indebtedness was standing against their property, which had been assumed when the artificial system was purchased. This it was claimed should be done by making provision for the payment of interest and amortization of the unpaid portion of the bond issue outstanding. The company has not been able, in order to fortify its position upon this contention, to show, or at least it has not shown, that there has ever been, during past years, any amortization in order to provide for interest and retirement of the bonds."

While the city was not able in said federal court case to secure the elimination of the gas-holder (p. 6384), this has not only been accomplished in the present case but the $1,231,766.78 worth of post additions (R., 3006A), exclusive of general overheads and going concern, which have been installed since the decision in the federal court case (R., 2898) have also been eliminated.

Up to 1914 appellant had its own gas fields, but with no reserves they became exhausted and the supply contract (Co. Ex. 31, R., 2879) was entered into. Just another instance of lack of amortization.

We think the foregoing statement in the city's brief is a telling argument against the treatment which has been accorded to appellant since 1924.

Exorbitant Operating Expenses.

At page 118 of their brief counsel refer to a "reserve fund of $1,166,762.30." This is the depreciation reserve; and is barely sufficient to cover the artificial mains eliminated by the federal court in the case referred to (17 Fed. [2d], 630), which case is still pending.

At page 113, on this subject, counsel say:

"The Columbia system purchased the Columbus company in 1924." (R., 896.)"

There is not the slightest support on Record 896, or any other page in the record, for this statement. The so-called "Columbia system" was not in existence at that time.

On the discussion that follows this statement we merely refer to page 7, et seq., of our opening brief.

We do not think that the operating expenses of any year prior to 1927 (which was the first year of the so-called Columbia system management) should be compared or contrasted with 1929, which is the basic year of this case.

Subsequent to the basic date in the federal court case appellant increased its plant approximately 34 per cent. (R., 2898), yet the increase in its gas sales was less than 10 per cent.

In the federal-court case (17 Fed. [2d], 639) the court affirmed the master in assuming that there would be a 10 per cent. increase in sales by virtue of the price fixed in that case, which gave an annual sale figure of 5,724,696 M. c. f. Assuming these sales, the court in that case

fixed a rate of 48 cents, which under the 1914 supply contract division gave to appellant for its distribution costs 16.8 cents per M c. f. (R., 145.)

Appellant's 1929 sales as found by both the majority (R., 182) and the minority (R., 220) were 5,671,639 M c. f. or 53,000 M c. f. less than predicted by the federal District Court in its decision of February 12, 1927, in respect of the 48 cent rate which was fixed in that case.

Yet in the instant case both the majority and minority of the commission, as well as the court below, approved a retail distribution cost of eight tenths of a cent per M c. f. less than was fixed by the federal court when the plant was much smaller.

Reducing this to a more concrete illustration: The provision made in the Federal Court case for cost of distribution and return on appellant's plant (then much smaller than it is now) amounted to 16.8 cents — 5,724,696 M c. f., or $961,749.00.

The provision made below in the instant case for the same purpose is 16 cents — 5,671,639 M c. f., or $807,462.00. In other words, notwithstanding appellant's plant has been increased approximately 34 per cent. since the valuation made by the Federal Court (R., 3006A), and notwithstanding the commission found the probable sales to be less than was found by the Federal Court, appellant is herein allowed $154,287.00 per year less for cost of distribution and return than was allowed in the Federal Court case, when there were no management fees.

Exorbitant Operating Expenses.

The return to appellant, allowed in this case (R., 185, 220) amounts to $261,797.00 per year. If we deduct from this the foregoing difference of $154,287.00 we have left for return only $107,510.00, or approximately 2½ per cent.

The distribution system expense (Accounts 389 to 407) for 1926 amounted to $100,584.52 as against $160,772.35 for 1927 and $168,615.27 for 1929. This additional $68,000.00, which amounts to more than one cent per M. c. f., was spent in giving service.

An examination of the accounts as set up in City Exhibit 2 (R., 3054, 3055, 3056, 3056A) will show that there was no chance to siphon any of this expense out.

Prior to 1927 there was no utilization system expense. This expense is composed of Account 411—Customers' Premises Labor, and Account 415—Customers' Premises Supplies and Expense. In 1927 appellant spent $20,354.33 on these accounts and this had increased in 1929 to $32,041.82. Again it was service.

In 1926 commercial system expense was $118,939.80. In 1927 this expense amounted to $178,344.60. The items composing commercial system expense include operating labor (Account 420) of $96,061.78 in 1927 as against $84,904.85 in 1926; and operating supplies and expense (Account 424) $82,282.82 in 1927 as against $34,034.95 in 1926. By 1929, however, appellant had been able to reduce this total to $120,769.28—a reduction equal to approximately one cent in the rate.

Prior to 1927 there was no business promotion expense. By 1929 this amounted to $52,658.05.

For 1926 other general expense (Accounts 448 to 460) amounted to $162,222.04. This had been reduced in 1929 to $107,570.65.

There has been added since January 1, 1927, employees' group insurance and other items—all as will be seen from an examination of City Exhibit 2. (R., 3054 and 3056A.)

These items of expense were analyzed by appellant's treasurer at pages 663, et seq., of the record.

85.05 per cent. of appellant's total revenue was received within the city of Columbus. (R., 665.)

4. THE FEDERAL GAS & FUEL COMPANY.

(City Brief, p. 3.)

We call attention to the following statement at page 3 of the city's brief:

> "An affiliated company of The Columbus Gas and Fuel Company, known as The Federal Gas and Fuel Company, also distributes gas in the city of Columbus. It did not complain to the commission about the ordinance but continued to retail gas at 48 cents per M c. f. **and is still doing so. (R., 3075.)**" (Boldface ours.)

As the court will see upon examination, the record citation does not sustain, or tend to sustain, any part of the foregoing statement except the first sentence thereof. While the second sentence is true in fact, the boldface

part is true only because of the existence of an injunction in Cause No. 2306, Court of Appeals, Franklin county, Ohio—The City of Columbus, a Municipal Corporation, Plaintiff v. The Federal Gas & Fuel Company, a Corporation, Defendant, and Cause No. 2307—State of Ohio, ex rel. John W. Bricker, etc., Plaintiff v. The Federal Gas & Fuel Company, a Corporation, Defendant. These causes are still pending, awaiting the decision in this case.

Assuming that counsel made their statement for some purpose, a short refutation of any inference that the Federal company was satisfied with the rate will be made. At the insistence of the commission we introduced in the case at bar the Federal company's revenues and expenses, its profit and loss statements for the years 1927, 1928 and 1929, its balance sheet as of December 31, 1929, its dividend history from 1925 forward, as well as other data. This was Company Exhibit 42. As we could not see how the Federal company was involved in the appeal to this court, we did not include this exhibit in our precipe for transcript, nor did the city. The valuation of the Federal company's plant is set out at page 639 in 17 Fed. [2], 630. It has a much smaller plant than appellant.

At the expiration of the time limit for filing an appeal with the Public Utilities Commission of Ohio there was pending in the District Court of the United States, for the Southern District of Ohio, Eastern Division, in

Equity No. 765, entitled The Columbus Gas & Fuel Company and The Federal Gas & Fuel Company, Plaintiffs v. The City of Columbus, Ohio, Defendant, (filed August 16, 1929), in which both The Federal Gas & Fuel Company and appellant were seeking to prevent the impairment of a contract resulting from the passage by the council of the city of Columbus of Ordinance No. 410-29 on June 3, 1929 (so-called "65 cent" ordinance) and the acceptance thereof by both of said companies. (R., 2983; Co. Ex. 30.)

As shown at Record, 2983, that ordinance by its terms granted a new franchise to The Columbus Gas & Fuel Company and fixed rates of; 75c minimum and 65c, 60c and 55c per M c. f. after January 1, 1930. The ordinance contained provisions settling all litigation between the gas companies and the city of Columbus, and provided for the acquiring of the property of The Federal Gas & Fuel Company by The Columbus Gas & Fuel Company.

That ordinance was accepted by The Columbus Gas & Fuel Company and The Federal Gas & Fuel Company, but was repealed by Ordinance No. 785-29. (Co. Ex. 31; R., 2983.)

In its complaint to the Public Utilities Commission (R., 126) appellant said:

> "In filing this complaint and appeal complainant does not intend to waive any right which it may have under said last mentioned franchise contract." (This reference being to the so-called "65 cent" ordinance No. 410-29.)

As Section 614-44 of the General Code of Ohio provides in part as follows,

> "The filing of a complaint by a public utility, as herein provided, shall be taken and held to be the consent of such public utility to continue to furnish its product or service, and devote its property engaged therein to such public use during the term so fixed by ordinance or by the provisions of this act,"

it was feared that if both of the parties to said litigation in the District Court should appeal to the Public Utilities Commission it might be held to be a waiver of their claimed contract rights under the so-called "65 cent" No. 410-29 ordinance.

On January 29, 1930, the District Court entered a final decree in said Cause No. 765 dismissing relator's bill. On the same day relator therein filed its petition for appeal, assignments of error and prayer for reversal, which were allowed by said District Court. The Court of Appeals later affirmed the District Court. Columbus Gas & Fuel Co. v. City of Columbus, 42 Fed. (2d), 379.

5. GASOLINE EXTRACTION AND THE PRESTON OIL COMPANY.

(City Brief, p. 468.)

All testimony, if such it can be called, in respect of The Preston Oil Company and Columbia Oil & Gasoline Corporation was developed by the city as a part of the cross-examination of the witness, Seyffert, over our objection. We could not have inquired about either of these companies in chief. They never had any business of any

kind with The Columbus Gas and Fuel Company. They were not engaged in a utility business.

As stated by the city in its brief at page 168, Columbia Oil & Gasoline Corporation was incorporated under the laws of Delaware just prior to 1930.

Starting at the bottom of page 169, the city's brief begins a discussion of City Exhibit 15 (original). This is the gasoline extraction agreement between The Ohio Fuel Gas Company and The Preston Oil Company **dated December 31, 1929.**

At page 175 of its brief, the city starts its discussion of City Exhibit 16 (original). This, as shown by the title page, is an operating agreement between The Ohio Fuel Gas Company and The Preston Oil Company **dated December 31, 1929.**

Just how contracts for future operations can affect either operating expenses or revenues of the past (upon which rates are based) is not clear to us. Neither the commission nor the court below made the slightest mention of these matters.

As to the profits from gasoline extraction, the city showed by City Exhibit 18-A (R., 3085-3086) that the Preston had a net profit from gasoline for the year 1929 of $80,547.25 and for the year 1930 a loss from gasoline of $30,561.79, leaving a profit for these two years of $49,985.46.

The only mention by either of the commissioners or

by the court below of The Preston Oil Company is by the minority commissioner at R., 203, where he said:

> "The amount included by the company for gas purchased from The Preston Oil Company has been reduced by $76,363.00 in recognition of the contract price for such gas as shown by the record."

This reduction is reflected in Sheet 1 of the Minority Commissioner's Exhibit "B" at R., 217, where the amount allowed for "Purchased Gas—from others" is $2,873,056.00.

By reference to Sheet 1 of the Majority's Exhibit "B" (R., 179) it will be found that the majority made this same reduction and same allowance for purchased gas. No explanation, however, was made by the majority for this reduction.

It will be seen therefore that the commission, both majority and minority, took an off-setting credit equal to within less than $4000 of the 1929 gasoline profits and, of course, much greater than the average profits for the two years introduced by the city.

No property of appellant ever went into the Preston nor did appellant ever have any business dealings of any kind with the Preston.

An examination of City Exhibits 15 and 16 (originals) will show that they are models of careful protection for the rights of The Ohio Fuel Gas Company. If The Ohio Fuel Gas Company did not have its contract with The Preston Oil Company, or some other company, to which it could turn over its oil wells, The Ohio Fuel Gas Com-

pany would have to put in an oil department, which, being a minor department of its business, would probably be run at a loss.

A page 175 of its brief the city says:

"Preston pays no delay rentals."

That this is not correct is shown by City's Exhibit 16 (original).

So far as concerns any lease rental accruing after December 31, 1929, City Exhibit 16, page 5 (original) thoroughly protects the rights of The Ohio Fuel Gas Company. On paiges 7, 8 and 9 of said exhibit it is carefully provided that the Preston shall not only reimburse the Ohio Fuel for all rentals and other charges accruing after December 31, 1929, on any tract in which oil is found by either company, but shall also pay all of such rents on the adjoining or protected tract as well as a share of the overhead expenses connected with such tracts.

When the gas company strikes oil such well is turned over to the Preston and the Preston pays all costs of drilling, as well as all rents and other expenses accruing after December 31, 1929. In case the Preston strikes a gas well, such well is turned over to the Ohio Fuel and the Ohio Fuel pays the cost and expense thereof. (City Ex. 16, original.)

An examination of said exhibit will show that it is confined to the acreage or leaseholds held by the respective companies as of December 31, 1929, and does not include after-acquired leaseholds.

Preston Oil Company

Under the contract the Preston and the Ohio Fuel each select their own well locations.

When the Preston drills a dry hole it stands the expense of that dry hole, and no part of that expense is paid directly or indirectly by The Ohio Fuel Gas Company.

City Exhibit 25 (R., 3106) shows that The Preston Oil Company had 71,672 acres of oil operated acreage in which The Ohio Fuel Gas Company not only had the right to prospect for gas itself but to claim any gas wells brought in by the Preston.

That same exhibit, as well as City Exhibit 24 (R., 3105) shows that in 1929, 43 oil wells were transferred to the Preston by the Ohio Fuel and 7 gas wells were transferred from the Preston to the Ohio Fuel.

That exhibit also shows that in 1929 out of 72 wells drilled by Preston 7 were gas, 11 were dry and 54 oil. The Ohio Fuel Gas Company did not bear any part of the dry hole expense.

The Ohio Fuel Gas Company's operated acreage for 1929 was 358,432 acres (City Ex. 27, R., 3020), while the operated acreage of the Preston for the same period was 71,672 acres. (City Ex. 25, R., 3106.) The producing wells of The Ohio Fuel Gas Company amounted to a little less than 8700, while the producing wells of The Preston Oil Company amounted to a little over 900. It would naturally follow that the Ohio Fuel would drill far more wells for gas than the Preston would for oil.

The evidence shows that the Ohio Fuel was compelled

to drill new wells continuously to fulfill its obligations while the Preston drilled only to supply a favorable market. Besides, the Ohio Fuel had to maintain its gas fields, gathering lines, compressor stations, transmission lines and other facilities whether the gasoline was extracted or not, and whether oil was found or not.

The city's evidence shows that The Preston Oil Company is owned by Columbia Oil & Gasoline Corporation; that the common stock of Columbia Oil & Gasoline Corporation is not owned by Columbia Gas & Electric Corporation. (R., 1002.)

At pages 177 and 178 of their brief, counsel for the city discuss the earnings from oil production of The Preston Oil Company, and say on page 178:

> "In all fairness the net profits of The Preston Oil Company should be credited against the operating expenses of The Ohio Fuel Gas Company."

While the city introduced over our objection much data respecting The Preston Oil Company we cannot locate in the record any profit and loss statement for the years 1929 and 1930 which years they discuss. If we are wrong and the figures are in the record, it will be found that for the year 1929 The Preston Oil Company sustained a net loss of $241,692.13 from oil operations and for 1930 a net loss of $749,341.58 from oil operations. From the combined oil and gasoline business The Preston Oil Company had a net loss in 1929 of $161,144.88 and for the year 1930 a net loss of $779,903.37.

If these data cannot be found in the record, the court will doubtless take judicial notice of the fact that the oil industry has been losing money in recent years.

If the city is really serious in insisting upon a consideration of oil and gasoline profits for recent years rather than the declaration of dividends out of earlier profits, we will gladly consent to a diminution of the record and the forthwith introduction of a profit and loss statement for The Preston Oil Company for the years 1929 forward.

6. PURCHASED GAS.

(City Brief, p. 260.)

At page 260 of the city's brief counsel say:

> "The average price paid by Ohio Fuel to independent gas producers in Ohio at the wells in 1929 was 15.57 cents per M c. f. (R., 913.)"

They then quote an article on the cost of gas transportation.

At page 7 of their brief counsel show that for year 1929, out of a total of 59,753,279 M c. f., 14,397,893 M c. f. were purchased from independent producers at an average cost of 15.57 cents.

When this evidence was produced it intrigued the commission because the commission was uninitiated, just as it would intrigue anyone not acquainted with the facts.

However, when the evidence before the commission was in it was found that while The Ohio Fuel Gas Company buys all of the gas offered for sale by independent

producers, this amounted over a three year period to an average of but 23.3 per cent. of the amount required by The Ohio Fuel Gas Company. (R., 1052.) It was further found that when consideration was given to the maximum demand of the system in severe weather, all of the independent production would supply but 13.9 per cent of that maximum demand. (R., 1052.) The evidence showed that the independent producers had no gas reserves and had no obligation to continue to produce gas.

Producers of experience testified that they preferred to sell gas in the field at 18 cents rather than to domestic consumers at 60 cents. (R., 1205.)

If the court will examine Company Exhibits 181, 182, 182A and 183 (originals) it will find a graphic illustration of the hopelessness of any attempt to rely upon purchased gas.

It will be seen from Company Exhibit 182 that as many as 2300 wells, out of a total of 3688 Ohio Fuel Gas Company wells, have been shut in at one time; while at another time, on the same exhibit, out of 3383 wells, 3349 were not in use. In November, 1929, it will be seen that out of a total of 3480 wells, 1306 of them were shut in; while approximately sixty days later out of a total of 3619 wells only 52 were shut in.

It was such evidence as this that convinced the commission and caused the majority to say at R., 148:

> "The commission has gained some conception through many expert witnesses, having undoubted skill and experience, of results accomplished by the intelligent expenditure of capital in an enterprise

whose hope of reward rests upon its ability to furnish to many small consumers a commodity, the enjoyment of which is eagerly sought. The commission has been impressed with the fact that this great natural resource could not have benefited the consumer unless there had been an intelligent application of capital to its development and transportation. It also has been impressed that in a gas plant, more than any other utility, there is a wide fluctuation between peaks and valleys of consumption, due to varied daily and seasonal requirements. **An efficient gas system must stand ready to serve the highest demands of severe weather, devoting to that service an investment in development and equipment much beyond that sufficient for the average load from which reliable income is derived.**

If the plant were in constant use of its full capacity, the price to the consumer would be less, but the plant must be built to meet the severest requirements, even though much of this capacity may remain in costly idleness during a large portion of the year." (Boldface ours.)

What is true of The Ohio Fuel Gas Company is true also of United Fuel Gas Company, which maintains reserves and reserve capacity.

The statement of counsel in city's brief at the bottom of page 136, that the Ohio Fuel "is thus actually obtaining only about one third of its necessary volume from its own Ohio acreage (R., 2905, 2906)" is manifestly wrong. Even the figures presented in the city's brief at page 7 show that the Ohio Fuel for the year 1929 produced more than half of its gas and that more than half of the balance came from the United.

Purchased Gas.

We call the court's attention to the following testimony re purchased gas:

Mr. Witmer testified (R., 1205): "Q. . . . but you do know generally that 18 cents at the mouth of the well throughout this territory produces a net profit? A. I think it does, your Honor. . . . . .

(By Mr. Turner.) Q. You have no obligation to continue supplying gas when the gas is out of those wells, have you? A. No obligation whatever.

Q. You have no pipe lines to maintain or write off, have you? A. None whatever.

Q. How would you like to supply gas to the city of Columbus for 18 cents? A. We wouldn't entertain a proposition at all.

Q. Would you rather supply gas in the field at 18 cents or to domestic customers in Columbus at 60 cents; which would be the more profitable? A. Gas in the field at 18 cents."

Mr. Seyffert testified (R., 944):

"Chairman Geiger: Well, now, what is the cause of the difference in the price between the 15.57 cents plus that you paid to the independent producers and the 26 cents you pay to one affiliated company and 35 cents you pay to The Columbia Gas & Electric; is it because you bought it at points more distant from Columbus or near to Columbus, or is it because you have a different guaranty as to supply?

The Witness: Well, it is some of all of those things; it is further from the seat of production; there is more transportation and it is a larger quantity; it is a guarantee of service to the local companies and to The Ohio Fuel Gas Company to continue doing business; whereas the other Ohio producers have no obligation whatever to continue; they drill a well; they are through when they drag

the gas to the top of the ground and have no obligation to get additional acreage to hold that reserve or to expand in any way. **It is just a sort of a by-product that we pick up as we can.** (Boldface ours.)

Chairman Geiger: In other words, you feel that the gas that you buy from a responsible producer who has back of it capital sufficient to insure you a constant supply is more valuable to you and would justify a greater price than the gas that is produced by a small independent company that may fail you when you need it?

The Witness: That is absolutely right.

Mr. Turner: In that case, may I ask a question, your Honor—if the independent producers maintain any gathering lines or any compressor stations?

The Witness: They do not.

Mr. Turner: Or pay the expense of taking the gas away from the well?

The Witness: They do not.

Chairman Geiger: The price you pay them is the price at the mouth of the well?

The Witness: That is right.

Chairman Geiger: The price you pay the other subsidiaries from whom you purchase at a higher price is for delivery of gas to what point?

The Witness: Part of it is delivered to Sugar Grove and part to Ravenswood but it has been collected by the other company and transported and compressed and all of those elements added to it before it is delivered to us."

7. RATE OF RETURN.

(City Brief, p. 101; Opening Brief, p. 224.)

In the case of **United Railways & Electric Co. v. West**, 280 U. S., 234, this court, by Mr. Justice Sutherland, said at page 251, after discussing the Bluefield case:

> "It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties."

While the various financial authorities, like Moody, Poor and others, do not rate natural gas investments very high, let us assume that appellant and or The Ohio Fuel Gas Company and or United Fuel Gas Company could each be financed with $50.00 of bonds, $25.00 of preferred stock and $25.00 of common stock for every $100.00 of the rate base; assume that the bonds could be sold on a twenty-five year basis (including all such items as discount and cost of financing) at a rate equal to 5½ per cent.; assume that the preferred stock could be sold

on a similar basis at a cost of 7 per cent.; assume that the common stock could be sold on the same basis at a cost of 8 per cent.; assume that we set aside for surplus 1 per cent.; the following tabulation shows the return necessary for each $100.00, to wit:

$50.00 of bonds	X 5.5%	$2.75
$25.00 preferred stock	X 7. %	1.75
$25.00 common stock	X 8. %	2.00
Surplus	1. %	1.00
Total		$7.50

In other words, it would require a minimum of 7½ per cent. to finance appellant or either of the other companies, with nothing added for the hazard.

Let us see if even this figure produces a sound investment basis. Every standard work on investment with no exception that we know of says that the bond interest ought to be earned at least three times. To earn the bond interest three times would require 8¼ per cent. The financial authorities further say that the preferred dividend ought to be earned three times. If we deduct from the $7.50 the $2.75 for bonds we have left $4.75 which is 50 cents per $100.00 short of the required test for safe businesses. When we ask an 8 per cent. return for so hazardous a business as the natural gas industry we think we are modest, and we sincerely believe that anything below an 8 per cent. return in the natural gas industry amounts to confiscation.

8. AMORTIZATION.

(City Brief, p. 109; Opening Brief, p. 34.)

At page 203 of the city's brief counsel say:

> "While it is true that amortization has never received legislative recognition in Ohio, if what is claimed as amortization constitutes some form of depreciation it may be included in the operating expenses under the Ohio statutes as construed by the decision of the court in this case. * * *"

This is a remarkable statement in view of the holding of the court below, which said (R., 72):

> "But we just cannot read amortization into the law of Ohio."

For answer to the city's discussion of the method used by the majority commission to ascertain the depletion of Accounts 205—Leaseholds, 211—Gas Well Construction and 212—Gas Well Equipment, we refer the court to our discussion under the heading "Depletion," which immediately follows this subject.

Though the majority commission made an allowance for depletion of accounts 205 leaseholds, 211 gas well construction and 212 gas well equipment, neither the majority commission nor the minority commissioner made any allowance for amortization. The court approved this action, although it recognized the fact and said in its opinion "That the product natural gas will eventually die is self-evident." Here again the court sought to justify its action by an unconstitutional interpretation of

the statutes of Ohio. The facts in the record are not in dispute. The court said in its opinion:

> "It is conceded that the life of the company will be at least twenty-five years. Hence, if amortization was allowable under the laws of Ohio, it should be spread over the twenty-five years."

We based our claim for amortization upon a twenty-five year further life. (R. 2907, 1480.) Amortization of the facilities of a natural gas producing and transporting company must be provided for or confiscation will result.

When the court's error of law is corrected and amortization at 4% (based on a further life of twenty-five years) is allowed on the minority commissioner's valuation of the production and transportation facilities other than the gas leaseholds, wells and equipment upon which the depletion allowance is computed, and exclusive of land, the gate price will be increased 3.8665¢ per M c. f., thus increasing the retail rate 4.0598¢ per M c. f.

In this connection we are talking about amortization of the remaining value of the property over the period of its future life. The fact that sufficient amortization has not been set aside in the past does not affect the question. The failure to set up amortization for wasting assets has left a long list of business wrecks. At page 112 of city's brief, attention is called to the disparity between assets and outstanding capital. If appellant's artificial gas plant and its natural gas fields, etc., had been properly amortized there would be no disparity.

Counsel seek to make use of Dr. Dewing's testimony, notwithstanding he was talking about **distribution** property, while it is the production and transmission property upon which we ask an amortization allowance. Counsel at this point do quote that part of Dr. Dewing's testimony showing that his conclusions contemplated the use of producer gas when the natural gas was exhausted. In the nature of things this could apply only to distribution systems.

9. DEPLETION.

(City Brief, 13; Opening Brief, 34.)

At page 13 of the city's brief under (1) an attack is made on our claim that no depletion was allowed by the minority commissioner, and it is there said:

> "The language of the minority commissioner cannot properly be given such construction. (R., 205.)"

We have discussed at page 59 of our opening brief this language of the minority commissioner. If there be the slightest doubt left in the mind of anyone that neither depletion nor amortization was provided for we call attention to the following language of the minority commissioner (R., 192):

> "The commission therefore can approach this problem without giving consideration to the life of the property other than to those factors resulting from normal depreciation and obsolescence."

Depletion.

The city conceded a depreciation allowance of $2,848,301.74 on the Ohio Fuel property. (R., 160, and City Ex., 74, p. 12, original.) In the face of this the minority commissioner allowed for depreciation but $1,765,607.00. (R., 217, 205, 192.) While the minority commissioner called this depreciation and amortization, his language shows clearly that there is no amortization considered, and the court below said that amortization might not be considered. The court below denied all depletion. As stated by Judge Jones in his dissenting opinion (R., 73):

> "Although the commission made a partial allowance therefor, the majority decision permits no allowance for depletion or amortization of utilities in cases such as these, where the annual drain upon their gas field resources by way of gas depletion is so heavy, eventually amounting to total exhaustion. Such a decision, in my judgment, where a low rate is fixed, tends to pure confiscation of property."

In applying its own rate of depletion the commission (majority) used the depleted value of gas leaseholds instead of the undepleted value. The undepleted or undepreciated value was used in computing the same allowance on gas wells and equipment, the same rate being used. This inconsistency reduced the majority commission's own allowance in the sum of $1,347,350.00 and reduced the gate price 2.51¢ per M c. f. After adjustment for lost gas this error resulted in a reduction in the retail rate of 2.63¢ per M c. f.

The court held that no depletion or amortization should be allowed on these wasting assets, and in this respect

agreed with the suggestions of the minority commissioner, although for a different reason. The court attempted to justify its action by an unconstitutional interpretation of the statutes of Ohio. The court did not question the facts as to the rate at which the depletion was taking place. Under the facts found by the majority commission, and referred to by the court, the correction of this error of computation by the commission, and the error of law by the court, will increase the gate price which the court approved 10.2642¢ per M c. f., and the retail rate 10.7774¢ per M c. f.

Counsel for the city concede that depletion of wasting assets should be allowed, but the claim is made that the commission should not have used the average age of abandoned wells, to wit, 7½ years, as the basis of the depletion allowance. It is urged that based on the age of the wells which were in operation on December 31, 1929, the basis should have been 15 years. This argument presupposes that an estimate as to the future life of existing wells is to be preferred to the facts as to wells whose entire history is known, and which afford a certain basis for determining the characteristics of the gas fields in which the wells are located. The argument also ignores the changes in the methods of operation on which the order of the commission is based. When the operations are limited to No. 1 acreage, and the additional wells are drilled thereon to maintain the gas supply, the faster removal of the gas from the acreage will make even the 7½ years used by the commission too long.

Depletion.

Even if the city's argument were sound and the depletion allowed at the rate conceded by the city, the increase in the gate price would still be 4.6370¢ and the retail rate would be increased 4.8689¢ per M c. f.

At page 212 of the city's brief we are charged with misinterpreting the court's opinion. We are unable to find anything in the court's opinion contrary to our statement. The basis used by the commission was used by the court in its discussion. The only conclusion of the court was that no part of the depletion allowance should have been included because not provided for by the statutes of Ohio. It found no fault with the basis, other than to say that amortization should have been spread over the 25 year future life of the property. While that is correct as to property other than the rapidly wasting assets, no one will contend that depletion of the gas wells and equipment should be computed on that basis.

The argument on page 213 of the city's brief, that the consumers should be credited with interest on the amount provided as depletion, entirely overlooks the fact that such moneys would have to be immediately reinvested in other leases, wells and equipment, and that the commission's order specifically provided that it could be used for no other purpose. (R., 161.)

10. DEPRECIATION.

(City Brief, pp. 85, 245; Opening Brief, pp. 84, 221, 222.)

In order to avoid the effect of the testimony of their own witnesses, and counsel's concessions, that the allowances for annual depreciation to both The Columbus Gas and Fuel Company and The Ohio Fuel Gas Company should have been larger than were allowed, counsel now say they had not taken into consideration the existing reserves on the books of the company. At page 87 of their brief they point out that The Columbus Gas and Fuel Company had a reserve for depreciation at the end of 1929 of $1,166,762, and at the end of 1930 of $1,251,886.77. In the case of **The Columbus Gas and Fuel Co. v. City of Columbus**, 17 Fed (2d), 630, the district court held that the mains of the company originally used for artificial gas were no longer useful and should not be included in the rate base. That case is still pending. When it is finally decided, if the company is required to write off these artificial mains, its depreciation reserve will be completely wiped out. The outstanding bonds on these artificial mains referred to by the court in that case still amount to $1,296,000.00. (R., 2896.)

While the United States District Court found the value of appellant's plant as of August 31, 1925, to be $3,976,359.00 (R., 3006A), and while appellant has since added to its plant net additions at cost, with overheads at the rate allowed by said court, to represent a total present value of $5,354,317.27, the commission and court below

allowed a value for appellant's plant of only $4,027,647.00. (R., 182, 220.) This shrinkage is sufficient by itself to wipe out appellant's depreciation reserve.

In respect of The Ohio Fuel Gas Company counsel at page 215 of their brief refer to the reserve on the books of the company. They do not point out that the figure of $18,973,285 is a reserve for the entire property of the company including its distribution properties not included in the appraisal here. In answer to the claim that this reserve justified any reduction in the annual allowance we need only quote the following from the opinion of the majority commission (R., 160):

> "The figures arrived at through appraisement as compared with those arrived at through an examination of the books show an excess of approximately $8,000,000.00 as disclosed by the appraisal which would indicate that the company has set up on its books a sum less than actual experience indicated should have been set up."

Company Exhibit 177 (R., 2999) referred to by counsel for the city shows that the ratio of the reserve to book investment has been decreasing. At the end of 1928 it was 22.73%, in 1929 it was 22.2% and in 1930 it was 21.19%.

11. GAS WELL CONSTRUCTION AND EQUIPMENT DEPRECIATION.

(City Brief, 178 et seq.; Opening Brief, 132—Present Value of Gas Wells.)

In considering gas wells we should keep in mind that they are composed of two accounts: Account No. 211—Gas Well Construction, and Account No. 212—Gas Well Equipment.

Where Ford, Bacon & Davis valued the gas leaseholds and gas wells as a unit they did use the depletion method for depreciation. When they came to make a valuation in the present United case in West Virginia they used the depletion method for the Gas Well Construction—Account No. 211 only, and the observed depreciation method for Account No. 212—Gas Well Equipment.

At page 179 of the city's brief it is said:

> "No mention of the United is made in this connection because the method employed by the commission, and not disturbed by the court, is the same as that adopted by the commission and court in the United case, the record of which proceeding is a part of the record in this case, * * *."

In making this statement counsel for the city have overlooked their own Exhibit 30 (R., 3020), which is a certified copy of the opinion of the West Virginia Supreme Court of Appeals in the United Fuel case involved herein. This opinion will also be found in the case of **City of Charleston, et al. v. Public Service Commission**, 110 W. Va., 245.

Construction and Equipment Depreciation.

Near the close of the opinion, as shown at Record, 3031, that court said:

> "It was stated in argument by counsel for the utility that the cost of well equipment was fixed at 46% of the original cost, no matter whether the wells were new or old. We suggest that the commission review again the evidence as to the wells; and unless there is a sufficient number of old wells to offset the new wells, then the value of the equipment be adjusted in some more uniform manner."

We called attention to the above language in this case at page 140 of our opening brief.

At page 185 of its brief the city says:

> "Surely, whatever method may be used for depreciating the gas well equipment, the hole in the ground loses all value the moment the gas well is abandoned through depletion or otherwise.
>
> * * * The hole in the ground is of no value or profit after it has ceased to produce gas in paying quantities. Indeed, it then becomes a liability because of the statutory obligation to plug it."

We ask the court to keep these statements of counsel for the city in mind when considering the subjects of amortization and depletion.

At page 14 of their brief, counsel for the city criticize our claim that the court below held that the present value of gas well construction and equipment should be arrived at by deducting from the reproduction cost new a percentage based upon the remaining gas content of the **gas field.**

That is exactly what we meant to say, and is further

explained at page 138 et seq. of our opening brief. We say that City Exhibit 74, page 9 (original) permits of no other interpretation.

To the following statement on page 187 of the city's brief:

> "In the United Fuel case in West Virginia where both Lerch and Blundon testified on the subject of gas well depreciation, Blundon's method of depreciating both gas well construction and gas well equipment on the basis of decline in rock pressure was adopted by the Public Service Commission (R., 2958)"

should be added:

> **and reversed by the Supreme Court of Appeals of West Virginia. (R., 3031.)** (City of Charleston, et al. v. Public Service Commission, 110 W. Va., 245), **and not followed by that commission in a later case where the same witnesses again testified.** (See below.)

Since the above decision by the Supreme Court of Appeals the West Virginia Public Service Commission has entirely abandoned the depletion method of depreciating both gas well construction and gas well equipment. **(City of Wheeling v. Natural Gas Co. of West Virginia**, P. U. R., 1933-D, 1.) In that case the commission said (p. 33):

> "The method employed by Ford, Bacon & Davis appears to be more agreeable to reason than the rock pressure decline method, and we will calculate the present condition of the gas well account at 82.9 per cent. of the condition of the property new."

Construction and Equipment Depreciation.

The Ford, Bacon & Davis method employed in the City of Wheeling case is the same as was employed by them in the instant case.

In explaining its change of position the commission said in that case (p. 32):

> "In the United Fuel Gas Company case (1930) supra, the commission followed an earlier decision (Re Clarksburg Light & Heat Co. (1927), 2 W. V. P. S. C. Decisions, 611, P. U. R. 1928B, 290) in giving effect to evidence of depreciation on the city's present theory. In reviewing that case the Supreme Court of Appeals remarked that the value of 'well equipment was fixed at 46 per cent. of the original cost, no matter whether the wells were new or old,' and directed that we 'review again the evidence as to wells, and unless there is a sufficient number of old wells to offset the new wells, then the value of the equipment be adjusted in some more uniform manner.'
>
> This is the first case involving this question since the directions of the court were given, and in which evidence has been adduced in support of the company's method of depreciation, supported by convincing evidence of the actual physical condition of the gas well property as an element of the plant that is useful for the transmission of gas, as a pipe line is useful to carry the fuel from the point at which it is found by the producer to the point at which it is needed by the consumer. In the light of the review of this subject which the testimony of those who assisted in this investigation affords, it would appear that the physical condition of the well property should be ascertained, if it is possible to do so by any dependable method. Property is not necessarily to be treated in an arbitrary depreciated condition merely because its present use will be completed at a more or less determinable

future date. Certain parts of the equipment of wells are recoverable, and are used again in new wells or in pipe lines, just as other equipment may be moved from place to place as the prudent management of a plant may require. So long as such property is used and useful, the owner is entitled to compensation for its use based upon its actual present value as property. A piece of equipment may be installed within a year before the entire plant is retired from service on account of failure of gas supply, and it may be in 99 per cent. condition when the service ceases. If its installation was essential to the service of the public, there seems to be no good reason why the owner's compensation for its use should not be based on its fair value at the time the service is rendered. The fact that it is to go out of service within a year, even if that fact were known, does not make it any less valuable at the time it is used, nor does it lessen the sacrifice of the owner in installing it.

Further investigation of the rock pressure decline method of estimating the present condition of a gas well has disclosed the inaccuracy of the results obtained from the data used by the city's engineer. So much depends upon the history of prior production of the wells, the quality and location of the various sands, the time and manner of taking the pressures, and numerous other factors which may affect the result, that accuracy is impossible under the method used by the city in this case. And if all this information were available, no light would be thrown upon the actual condition of the well property as such or upon its present fair value for rate-making purposes.

The question remains whether the investigation made by the company's engineers was of the proper character and sufficient in extent to ascertain correctly the depreciated condition of the gas wells.

Construction and Equipment Depreciation.

Material from nine wells just abandoned was inspected. The oldest of these wells was drilled in 1907, the latest in 1924. Of the company's 399 wells, 22 were drilled before 1907 and 84 have been drilled since 1924. If the material was new when installed, the wells that were inspected may reasonably be assumed to constitute a fair average for those now in use, and if not new when installed, then their condition might be assumed to be even poorer than that of the remaining wells."

In view of the holding by the West Virginia Commission in the above proceeding, where both Messrs. Lereh and Blundon testified, and in view of the reversal of the Blundon method by the Supreme Court of Appeals of West Virginia in the case of **City of Charleston v. Public Service Commission**, 110 W. Va., 245, the following statement of counsel for the city on page 187 of the city's brief needs modification:

"In the United Fuel case in West Virginia where both Lereh and Blundon testified on the subject of gas well depreciation, Blundon's method of depreciating both gas well construction and gas well equipment on the basis of decline in rock pressure was adopted by the Public Service Commission. (R., 2958.)"

12. VALUE OF OPERATED LEASEHOLDS

(City Brief, 149; Opening Brief, 93.)

In spite of the evidence of competent and experienced witnesses, the lowest of whom placed the value at $39.37 per acre, and the average of the several witnesses being $66.07 per acre, the commission placed a value on this acreage of only $25.00 per acre. This value was used because the Supreme Court of Ohio in another case had approved that value for a part of this same acreage.

The court below in this case disapproved the valuation of $25.00 per acre and said book value only should be allowed. Two reasons are given by the court: (1) that there is no market for these leaseholds; and (2) that a value can not be predicated upon earning capacity. Even if these propositions are correct as statements of law, they are not applicable in this case. A market for these leaseholds does exist and this fact was established by the uncontradicted evidence. (See pp. 96-104 of our opening brief.) The values shown were not the result of any estimate of earning capacity, but upon the price at which the leaseholds could be sold in the open market by a willing seller to a willing buyer. (See our opening brief, pp. 104 et seq.) The witnesses answered many questions asked in cross examination and by members of the commission but they never at any time changed the basis upon which they had arrived at their values.

We hold no brief for the $25.00 per acre placed upon

these leases by the commission. We contended then and we contend now that all the competent evidence in the case showed them to have a value much greater. However, in fairness to the commission we feel we should say that the charge by counsel for the city on pages 164 and 165 of their brief that the "commission turned entirely from the record in the case" is not true. The finding of the commission in the Logan case that the part of these leases then owned by The Logan Gas Company were worth $25.00 per acre, and the evidence upon which it was based, being the finding approved by the Supreme Court of Ohio in 124 O. S., 248, were introduced by the city before the commission as City Exhibit No. 78.

In our opening brief, page 121, we have pointed out that the acreage classified for appraisal purposes as No. 1 did not include all the acreage carried on the books as operated. The statement on page 149 of the city's brief as to the size of leases which may be carried as operated, does not apply to the classification of leases as No. 1. As shown by City Exhibit 26 (R., 3019) the operated leaseholds amount to 347,306 acres. No value was allowed except for the 291,396 acres of No. 1.

13. VALUE OF UNOPERATED LEASEHOLDS.

(City Brief, 132; Opening Brief, 64, 118.)

There was no dispute in the evidence and no finding by the commission as to the value of the unoperated leaseholds. The lowest witness placed this value at $15,265,706 (R., 2910) and the average of the several witnesses was $23,752,448. (R., 2911.) These leaseholds were omitted from the valuation by the commission and the court on the theory that they were excluded by the "used and useful" provision of the Ohio statute. The uncontroverted evidence of practical gas men shows them to be within the "used and useful" provision, and therefore not excluded by the statute. Even if they were so excluded, property necessary to the organization, construction and operation of the business must be included in the valuation and a return allowed thereon, to prevent confiscation of property.

We again find it necessary to complete the statement of a witness upon whose testimony partially stated, counsel for the city base an argument. At page 138 of the city's brief reference is made to the testimony of Seyffert appearing at Record, 1052, 1053. So far from saying that the No. 1 acreage would last the company 10 years, or 5 or 6 years if no gas were purchased from other sources, the witness definitely stated that no such result could be accomplished, because the cost would be pro-

hibitive. The following is the testimony referred to (R., 1052-1054):

"A. If we were confined to the use of Number 1 acreage only, we would very shortly run ourselves into very greatly mounting costs on the one hand or else a decided shortage of gas on the other, and it is the latter that would be more likely to occur, because if we were limited to Number 1 acreage, which, as I recall, is some 291,000 acres, and estimates have been made of reserves under that of say approximately 300 billion cubic feet; at the rate that we are now producing, assuming that we could buy gas from independents and West Virginia in the same amount that we are now buying, the amount of gas in the ground would only be equivalent to about a ten year period and if we were not able to buy this gas from other sources, the amount of gas in the ground would only be equivalent to five or six years' supply if we could get it out of the ground in that time, which would be impossible. If the West Virginia company were further restricted to only the use of their Number 1 acreage, we would very certainly be compelled to get along without that gas for Ohio, because they could not in turn produce the amounts.

Now, I would like to go a little further there to explain the situation. You have a reservoir with an estimate of a certain amount of gas in it. We have had on that reservoir at the time, December 31, '29, approximately 3,600 wells. Taking that, together with the dry holes that have been drilled, and the abandoned wells also on Number 1, would indicate that there has been a well drilled to somewhere around from 65 to 75 acres. Now, the company, if they wanted to take the gas out of that area in a proper and economical way, would perhaps not drill any more wells at all on it except those wells that are necessary by reason of lease requirements or

offsets by others, that is, wells that we would have to offset others in order to protect our interests and protect the interests of our own leases. Now, if an attempt were made to take that gas out of that area in a shorter period, it would mean immediate depletion of the rock pressure, the rock pressure would immediately go down and each well would produce a correspondingly smaller amount of gas or it would take a longer time to get the gas out. Ultimately, the full recovery could be gotten, but it would take a longer period of time.

Now, if that area were drilled without regard to the cost, we would have to put down two or three times as many wells which would reduce the rock pressure. Gas would then flow very much more slowly in the opening made by the well, which in turn could not get out of the well unless the line pressure were reduced, which would mean additional pumping equipment to reduce the line pressure in order to take the gas out of the ground and get it to the market, because, assuming again the market demands being as they are today, we would still need the discharge pressures at the compressor stations that we now need, but the difference between the discharge pressure and the intake prossures would be a great deal different, necessitating therefore a great deal more power to bring that gas from a low pressure, which would be necessary to take it out of the ground, and the higher pressure necessary for the transmission of it to the markets. The result would be that recovering the quantity of gas that is in that area, the price would just mount, two, three, four times, just up to a prohibitive figure, it just wouldn't be done."

From a reading of the opinion of the court in **United Fuel Gas Company v. Public Service Commission of West**

Virginia, 14 Fed. (2d), 209, from which counsel for the city of Columbus quote on page 143 of their brief it will be seen that the case differs from the case at bar in important particulars. While the court in that case recognized that leases on gas lands had a value as leases, no evidence of such value had been introduced. In the case at bar that was the basis of the values testified to by the witnesses. In that case the evidence led the court only so far as to say that the acquisition of the reserve leases may have been prudent. In this case the uncontradicted testimony is that the ownership of the reserve leases is absolutely essential to the existence and operation of the company. The reasoning of the court in that case on the point in question is inapplicable to the facts here. The affirmance of that decision by this court in **United Fuel Gas Co. v. Public Service Commission**, 278 U. S., 322, is likewise no precedent on this question, for at the same time this court in 278 U. S., 300, affirmed a decision of Judge Hickenlooper, in the case of **United Fuel Gas Co. v. Railroad Commission of Kentucky**, 13 Fed. (2d), 510, in which he said in respect of reserve acreage:

> "We think it must be conceded that the company has a right to hold, as used and useful in its business, reserve or undeveloped gas acreage in which to prospect for gas. Much of this may prove unprofitable but it is necessary for the continuance of the life of the business."

Value of Unoperated Leaseholds.

The statement by counsel for the city at page 135 of their brief

> "* * * in 1930 Ohio Fuel abandoned 525,445 acres of this unoperated leased territory."

is misleading. In City Exhibit 49 it is shown that in Account 360 "Rental Unoperated Leases" the lease rentals in 1930 amounted to $1,888,572.22 as against $1,533,671.65 for 1929, being an increase of approximately $350,000 per year and showing a net increase in unoperated acreages instead of a decrease.

Company Exhibit 44 (R., 2910) shows as of June 30, 1929, the following acreage held by The Ohio Fuel Gas Company:

No. 1 (operated)	291,396 acres
Nos. 2-3-4 (unoperated)	2,542,791 acres
Total	2,834,187 acres

City Exhibit 90, original (testified to by Mr. Butler at R., 1473) shows as of December 31, 1930, the following acreage held by The Ohio Fuel Gas Company:

Operated	360,255 acres
Unoperated	2,565,473 acres
Total	2,925,728 acres

These exhibits show a net increase not only in unoperated acreage but in the total acreage held.

On the following page 136 counsel say:

> "* * * but Ohio Fuel, the public utility, has always assumed the expense of securing all leaseholds for both companies and also the payment of all delay rentals."

As it does not appear in the record we can not discuss the short time that the Ohio Fuel and Preston have been related. However, we do show at another point in our brief, in the discussion of The Preston Oil Company and City Exhibit 16, original, that in the contract entered into between The Ohio Fuel Gas Company and The Preston Oil Company, the Preston does pay its own delay rentals and does pay the cost of securing leases plus overheads on all leaseholds which become oil leaseholds.

At page 150 of the city's brief, counsel say:

> "Dally is associated with the Benedum Trees Oil Company, which has recently become connected with the Columbia system."

There is no substantiation of this statement in the record and so far as we know none in fact. We do know it was not true at the time that the Benedum-Trees Company submitted its offer for the leaseholds of The Ohio Fuel Gas Company. (Co. Ex. 140; R., 2989.)

The brief reeks with statements de hors the record. When the court encounters statements in the city's brief embracing matters subsequent to 1930, such as at pages 90, 92, 93 and 95 of the city's brief, it may safely assume that such statements are not based upon anything in the record. The ordinance appealed from became effective

in November, 1929. For convenience December 31, 1929, was used as the basic date. At times a paragraph will be opened with a sentence supported by the record. This will be followed by other sentences not supported by the record. At the end of the paragraph, however, will be cited the record supporting the first sentence.

The Ohio Fuel Gas Company had at one time attempted to get at the cost to it of its gas leaseholds and had started some elaborate exhibits. Finding, however, that the data were not available they abandoned the attempt. When the commission ordered appellant to produce the valuations, expenses, etc., of The Ohio Fuel Gas Company, in order to avoid much delay, which appellant was constantly fighting, we had some exhibits made from the papers upon which The Ohio Fuel Gas Company had attempted to collect its cost data. Strips of paper were put over this cost data and the balance of the papers photostated as exhibits. The city insisted that the papers from which the exhibits had been made should be produced. When they were produced Mr. Blundon used this incomplete data in preparing his pages 24 and 25 of City Exhibit 115. At page 1452 of the record Mr. Blundon was asked:

> "Q. Now, in preparing your Exhibit 115, page 24 and page 25, you did not go to the books of The Ohio Fuel Company for any data, did you, the books of account? A. Not for the data in connection with pages 24 and 25.
>
> Q. Especially, consideration? A. That is correct."

As will be seen from the pages of the record following, especially 1453 to 1456, Mr. Blundon's costs were based upon the examination of as little as .36 of 1% of the leasehold acreage in a single county.

14. COST OF ORGANIZATION.

(City Brief, p. 188; Opening Brief, p. 147.)

At page 14 (5) counsel call the court's attention to our statement on our page 17, "(6) No value allowed for cost of organization." (This refers to The Ohio Fuel Gas Company.) This statement as there made we still maintain. However, at page 147 of our brief we said:

> "No allowance was made by either the majority commission or the minority commissioner for cost of organization. Ford, Bacon & Davis, Inc., placed the amount at $1,999,922. (R., 1656.) There was no testimony to the contrary. The witness, Blundon, for the city just left it out, and the commission did likewise."

The foregoing statement should have been supplemented and modified with the further statement:

While the majority commission frankly eliminated the item and did not attempt to cover it up in overhead allowance (R., 165) the minority commissioner said (R., 197):

> "I have eliminated any specific allowance for organization due to the fact that this element is in the allowance of 14% for undistributed construction expenditures."

In his analysis of his 14% (R., 198) he allowed 1% for organization as against the 2½% estimated by Ford, Bacon & Davis. (R., 2912.)

Ford, Bacon & Davis, whose valuations outside of cost of organization, going concern value, overhead allow-

[illegible] and present or depreciated value of gas well construction and equipment had been accepted by both the majority and minority commission, had fixed overheads at 2% in addition to the overhead allowance there was the specific allowance by Ford, Bacon & Davis of $1,999,000 for cost of organization. (R., 2912.) This was for the entire Ohio Fuel Gas Company. For Ohio only the allowance was $1,975,500.00, which we should have used at page 147 of our brief.

Commission for the city conceded a 14% allowance for [illegible] (R., 1739.)

II. INCOMPLETE CONSTRUCTION—WORK IN PROGRESS.

(Gas Brief, 180; Opening Brief, 147.)

At the date certain there had been expended $234,295 [illegible] for new gas wells. (R., 1765.) This investment was not included in the rate base, nor considered in arriving at working capital. No reason was given by the majority commission, and the omission was not explained by the record. The minority commissioner attempted to justify the omission on the ground that it was [illegible] used and useful, and because interest during construction had been allowed in the general overheads. (R., [illegible].) Neither reason is sound. The money had been expended necessarily and properly, and the company is entitled to a return on it. The allowance of interest during construction does not correct the error since the amount was not included in the principal on which the allowance was computed. (R., 180, 217-218.)

16. GOING CONCERN VALUE.

(City Brief, p. 44; Opening Brief, pp. 423, 206.)

At page 68 of their brief counsel say:

> "The fact that what was actually going concern value in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element."

We do not quarrel with this statement, but we challenge anyone to find any going concern value in the rate bases in this case.

Not a witness in the case included any element of going concern value in his allowances for general overheads. Welker, who made the company appraisal of the property of The Columbus Gas and Fuel Company, said (R., 439):

> "Q. Have you included in your construction overheads any such thing as alleged going concern? A. No, sir; I have not included in my construction overheads any such thing as going concern value."

The going concern value of that company was separately proved by other witnesses. (R., 2574, 2614, 2560.)

Allensworth, who made the appraisal for the city of the property of The Columbus Gas and Fuel Company, said (R., 3627):

> "Q. In that No. 60 Mr. Allensworth, where you speak of Allensworth reproduction cost and Allensworth reproduction cost new less depreciation, there are certain places where you have in your column no amount at all, simply a hyphen or a dash. That

means that you disallowed that amount entirely, that subject? A. Yes.

Q. That is true as to going concern value, is it not? A. Yes, sir."

The only pretense Allensworth made of recognizing going concern value was that he had valued the property at what it would cost to reproduce it, and not as junk. (R., 2721.)

Ford, Bacon & Davis for The Ohio Fuel Gas Company allowed it and proved it as a separate item. (Co. Ex. 45, R., 2914; Testimony of Wheeler and Lerch, R., 1663, 1716.) Blundon for the city of Columbus made no valuation. He only adjusted the Ford, Bacon & Davis valuation. He eliminated the item of going concern value. He said (R., 1938):

"Q. On page 17 of Exhibit 74, in your allocation here, you have made no allowance of any kind for going concern value, have you? A. No, sir."

He did not switch going concern value over into general overheads, for at the same time he eliminated it from Ford, Bacon & Davis' appraisal, he also reduced their allowance for general overheads to 14%. (R., 1739.) This was the amount used by both the majority and minority commission. (R., 165, 198.)

The West Virginia commission separately valued the going concern value of United Fuel Gas Company. (Co. Ex. 78, R., 2959.) In City Exhibit 88, (R., 3167), where Blundon set up his figures for United Fuel Gas Company there is a blank line opposite the heading "Going

Value." Here also he reduced the general overheads from the 17% to 20% allowed by the West Virginia commission in Company Exhibits 78, to 14%. (R., 2219.)

The majority commission and the minority commissioner both used the same percentages for general overheads. The majority commission definitely said there was not going concern value provided for. (R., 171.) The minority commissioner made no allowance, and planted himself squarely on the discarded doctrines hereinafter mentioned. (R., 201.) He did not claim to have provided for it in general overheads, but said in view of the units and overheads applied (which were on the basis of reproduction cost new) he "disallowed any amount for going concern value." (R., 209.) Furthermore he itemized his overhead allowances (R., 198) and there is not an element of going value in them.

The argument of counsel for the city is directly opposed to the holdings of this court. They urge that since the plant is appraised at more than its salvage or junk value, going concern has been allowed. This idea was definitely disposed of by this court in the case of **Denver v. Denver Union Water Co.**, 246 U. S., 178. In that case the same claim was made in an effort to defeat an allowance for going concern value. This court said:

> "In this situation there can be no question of the company's right to adequate compensation for the use of its property employed, and necessarily employed, in the public service; nor can it be doubted that the property must be valued as property in use. It involves a practical contradiction of terms to say

that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its 'junk value.'"

* * * * * * * * * * * * * * *

"What we have said establishes the propriety of estimating complainant's property on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures. That this method was fairly applied by the special master hardly is disputed by appellants, except as they contest the items allowed for 'going concern value' and for the water rights acquired by complainant and its predecessors by original appropriation. With respect to the former item, we adhere to what was said in Des Moines Gas Co. v. Des Moines, 238 U. S., 153, 165, 59 L. Ed., 1244, 1250, P. U. R. 1915D, 577, 35 Sup. Ct. Rep., 811: 'That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned, although dedicated to public use.'

As was then observed, each case must be controlled by its own circumstances. In the present case, the master expressly declared that his detailed valuation of the physical property and water rights included no increment because the property constituted an assembled and established plant, doing business and earning money; and a careful examination of his very elaborate report convinces us that this is true. The amount allowed by him on this account is not open to serious question from the standpoint of appellants."

Going Concern Value.

Counsel for the city then argue that the statutes of Ohio make no provision for allowance of going concern value. Even if that were so, the statutes can no more stand against confiscation than can the order of the commission.

They then argue that since reproduction cost new less existing deterioration was used as the basis of the valuation, that the property has been valued at more than its original cost, and therefore going concern value is provided for. Aside from being a guess (the original cost of the property not being known) this is a new idea of the reason and purpose of a reproduction cost appraisal. It completely overlooks the holdings of this court that in order to prevent confiscation, the regulated utility must be allowed a return on the property devoted to the public service "at the time it is being used." **Bluefield Waterworks and Imp. Co. v. Public Service Comm.**, 262, U. S., 674.

Their final reliance is placed upon the argument condemned by this court in **Public Utilities Commissioners v. N. Y. Tel. Co.**, 271 U. S., 23, to wit, that a utility should not be allowed a return on any property which may have been paid for out of revenues.

The self-evident existence of going concern value was disregarded. None was allowed. Notwithstanding the court's reference to going concern value "as a separate item" designed to intimate that it might be buried somewhere in the valuation, it is not there. The witnesses were specific on this point, and the detailed findings of the commission demonstrate that no allowance was made for this element of value. The failure to include it was contrary to the evidence in the case, and to the holdings of this court.

17. ALLOCATION.

(City Brief, p. 218; Opening Brief, p. 150.)

The reviewers who have so far reviewed the decision of the court below in this case have criticized that decision for its holding in respect of both allocation (Michigan Law Review, p. 1, for January, 1934—see Opening Brief, p. 203) and amortization (Yale Law Journal, p. 483, for January, 1934—see Opening Brief, p. 34).

Just why the court should say (R., 51) that one part of The Ohio Fuel Gas Company property should be allocated on a sales basis and another part on a so-called "demand-mileage" basis, we cannot understand.

At page 239 of the city brief counsel say:

> "The cost of producing gas by Ohio Fuel itself varies with each well and the cost of buying it varies according to each contract. We, therefore, for convenience and in observance of what seems to be the commonly accepted method, put all the **production property and production expenses throughout the entire state in one pool and averaged it to all users, regardless of location, miles of service or other variance, and allotted this property and these expenses uniformly through the state on the basis of gas sales.** (R., 1869 et seq.)" (Boldface original.)

We cannot understand why this same argument does not apply to the transmission system. Counsel for the city think it applies to some of the transmission system or they would have had their engineers go back of the "last point of major compression." For instance, a sub-

stantial portion of the gas is produced in West Virginia and must be transported from the wells in West Virginia. If distance of miles traveled be the material matter, then surely the transmission system of The Ohio Fuel Gas Company from the Ohio river to Columbus should be considered on the demand-mileage allocation basis. The reason, however, for leaving out not only one but both of the lines to the Ohio river through which natural gas is transported to the Wheeler station is that an allocation factor would be obtained which would produce a gate price greater than the contract price. This allocation factor is shown at Record, 2069 to be 25.1395, considering a single line to the Ohio river, instead of Blundon's 10.2782.

The following cross examination on this subject appears at the bottom of Record, 2068 and top of 2069:

> "Q. Mr. Carter, in Company's Exhibit 169, you conclude, if I understand you, that if the 65 miles were taken into Blundon's figures, that is the 65 miles back of the compressing station to the river, his figures for Columbus would have been 25 plus instead of 10; am I right about that? A. I think that is substantially correct.
>
> Q. Do you seriously mean that? Do you mean to tell this commission now, Mr. Carter, that following Blundon's methods and Blundon's figures, if he had given consideration to that 65 miles between the river and the compressing station that he would have reached for Columbus the figure of 25 plus instead of the 10 that he did reach? A. I don't think that is quite what I said, Mr. Butler.
>
> Q. What did you say? A. I said if you did consider the demands for Columbus as used by Mr.

> Blundon, or as shown on Mr. Blundon's work sheet, and if you assumed that that demand traveled the additional distance from the river up to the station, which was 65 miles, and if you made that allowance in the demand mileage figure for Columbus and also in the total demand mileage figure, that the resultant figure would be 25.1395."

The witness, Earl L. Carter, is the same witness whose testimony and exhibits were examined by this court in the case of **McCardle v. Indianapolis Water Co.**, 272 U. S., 400.

The attack on Mr. Carter by counsel for the city shows a peculiar mental attitude toward the professional ethics involved in the use of experts.

Mr. Carter was called into the case simply and solely because the city's witness, Blundon, attempted to claim that he had made the West Virginia allocation and was making the Ohio allocation on the same basis. After consultation with our engineers, and being assured by them that no reputable engineer would honestly and fairly attempt such an allocation, we simply took a chance, sent for Carter, and told him to go ahead. When he reached the conclusion that a demand-mileage allocation could not and should not be applied in this case he so told the commission, and gave his reasons therefor. (R., 1988, 1999.)

At page 255 of the city's brief counsel say:

> "If Carter's conduct be four-square, then we have no proper appreciation of what professional expert ethics mean. We may say that this episode is an

exemplification of a city's difficulty, not only in securing, **but also in keeping experts.**" (Boldface ours.)

We had always supposed that the proper ethics for a professional or expert witness to follow was to testify to the truth, and to appear indifferently on either side as an aid to the commission and/or courts. Partisanship is the one thing that has brought criticism upon the office of the expert witness.

We cannot see how Mr. Carter was guilty of unprofessional ethics in coming to Columbus, Ohio, and telling the commission here what he did in a case before the West Virginia commission in Charleston.

Mr. Carter fully explained his connection with the United Fuel case in West Virginia at Record, 2037 et seq.

Allocation is not the simple problem that the city would have the court believe. For instance, at page 240 of the city's brief counsel say:

> "Let us consider two cities using the same quantity of gas and having the same load factor. Let us say that one requires twenty miles of pipe line while the other requires forty miles. Clearly, as a transmission proposition one will require more than twice the investment in pipe line and compressor power than the other requires. Twice as much gas will be used as fuel to pump to the one as to the other. Twice as much will be spent in the maintenance of pipe line for the one as for the other."

Assuming these statements to be correct, and there were just the two or even more cities involved on a

straight line, the problem would not be difficult. But that is not what we are dealing with here. We are here dealing with an interconnected system which has 38 compressor stations transporting gas from approximately 3600 of its own wells, all of which gas is capable of delivery through the system to any point on the system.

As stated by counsel for the city at page 7 of their brief:

> "Ohio Fuel is both a retailer and wholesaler—that is, it is a distributing company in several hundred cities, towns and communities, and also sells gas wholesale to a great many distributing companies most of which are Columbia system subsidiaries, and among which is The Columbus company. In 1929 it reported sales as follows: Retail, 25,464,269 M c. f.; wholesale, 29,674,933 M c. f. (R., 2903, 2904.)"

As said by the majority commission (R., 167):

> "As a matter of fact, gas is produced or purchased wherever available and transported in a system of interlocking pipe lines to the point of consumption and it may be broadly said that the entire system within the state of Ohio has, at some time and to some extent, been devoted to the service of every municipality served by the company."

The minority commissioner said (R., 195):

> "Columbus gas may come from West Virginia, it may come from southern Ohio fields or from northern Ohio fields. It may be brought through one of several transmission systems or compressed in one station or in many."

Allocation.

If it had been possible for us to have gotten over to the court below in the short time allotted for oral argument on the many questions involved the real nature of natural gas transmission, the court would never have made such a holding as it did. As the commission had unanimously found that a demand-mileage allocation was impossible, and as we supposed that the court would naturally give weight to the commission's judgment in such a technical matter, where the commission had a staff of trained engineers as advisers, we frankly did not give much attention to the subject of allocation in our oral argument.

That the members of the commission did understand natural gas transmission is shown by their respective opinions, and the following language of the minority commissioner is particularly apt (R., 195):

> "It is impossible to trace this gas in any portion of the system and **it is the pressure applied from the various sources that determines the flow of the gas rather than the source of any one transmission line.**" (Boldface ours.)

The Ohio Fuel's transmission system may be likened to a body with an arterial system but without a venus system. Before natural gas service may be enjoyed by any consumer at any point, far or near, it is necessary that the company pack its entire system with gas. There is no return of the unused fuel. There is no circulation of the gas until it is needed or used by one or more con-

... The system is constantly packed with gas and, ... the majority commissioner said,

> "... the pressure applied from the various sources ... determines the flow of the gas rather than the ... of any one transmission line."

The transmission of natural gas differs from the trans... of physical goods. A railroad carrier is in ... in the furnishing of a transportation serv... from a specific point of production to a specific con... permanently owned. If the consignor or con... of a car of coal or a tank of oil finds that an order ... shipment is reconsigned and an ... charge imposed. The shipment ... like the handkerchief in the childish ... in front of a member of the ... natural gas which the Ohio Fuel has once ... into the transmission system. The Ohio Fuel's in... is not confined to the transmission of specific gas ... specific customer.

... all that is said in the city's brief, ... the exceptions, did comply with the ... in order to allocate and did submit Company ... showing The Ohio Fuel Gas Com... ... of natural at the city gate to be 61.61 cents ... While the commission rejected the gate pric... ... it did adopt that method of alloca... ... to control a further allocation but ... by the commission.

Allocation

In the city's brief Wheeler compressor station is emphasized and the 37 other compressor stations, all pumping gas into the same system of pipes, are ignored. This occurs throughout their argument on page 223, et seq., relative to Phillips' Exhibit No. 23 (3958, A and B).

This exhibit was introduced long before any question about allocation had been raised in this case. It was introduced to give the commission an idea as to the percentage of West Virginia or interstate gas passing through Wheeler station on two different days and where the gas went to after leaving Wheeler station. (R., 1773-74.) It was never claimed to be more than an estimate (R., 1822, 1834) and the commission was never asked by appellant to base any definite findings upon it. Phillips testified that the results would be different on any other day or days selected. (R., 1822, 1823, 1833.) It cannot be used as the basis of a demand mileage allocation.

Counsel for the city have tried hard to make something out of Phillips' statement, quoted on page 227 of their brief, that unless something out of the ordinary required it gas would not be brought from the "northern part of the state to the southern part of the state." There is no basis in that statement for the argument that the gas fields and compressors north of Columbus do not contribute to the Columbus supply. Columbus is in the central part of the state. Even the testimony quoted shows that gas is taken from Treat station, northeast of Columbus, to Wheeler station, southeast of Columbus.

Allocation.

Gas can and does come into Columbus from the south, east, north and west. The service afforded Columbus is no less than that afforded every other community on the system. No other community is afforded any more. The system has been designed and is operated to accomplish that very result. There is nothing unfair in the conclusion of the commission that for the same service all communities should pay the same price per thousand cubic feet of gas supplied.

Counsel assume extravagant examples of varying demands in order to support their argument and emphasize the importance of demands. Everyone knows there is not a city or community on the system that uses natural gas at the same amount each month of the year. They all vary and the system is designed to and does supply each community with its peak demand when and as needed. None of the property of the company is used to capacity all the time. This situation is provided for by an allocation on the basis of sales. The system load factor effect is applied to each community alike. As a matter of fact under the city's figures this method is advantageous to Columbus so far as load factor is concerned. In Company Exhibit 196 (original), the system load factor is shown by the city's figures to be 51.7%. In the same exhibit Columbus is shown to have a load factor of only 49.7, and its rate would therefore be higher than the average if effect were given to its load factor.

We hope that this court will not be misled, as was the

court below, into assuming that the evidence shows that The Ohio Fuel Gas Company has any line to Cincinnati.

At page 228 of the city's brief it is said:

> "* * * the great pipe line stretching out to Indiana and to Toledo and to Cincinnati * * *"

Attached opposite this page the city sets out one of its own "compiled" maps which was not an exhibit in the case and similar to the one we referred to in our application for rehearing. (R., 78.)

The court will find the maps introduced below printed at pages 3058A and 3058B of the record.

The situation as presented by counsel for the city seemed to shock the court below. Yet if the court below had read the record it would have the answer to its own question, to wit:

> "Just why the city of Columbus should be charged for pipe lines extending to Indiana, to Toledo and to Cincinnati, we cannot understand."

The fact overlooked by the court below was that **all revenues, wherever received within the state of Ohio were credited, and that, excluding the city of Columbus, those revenues exceeded expenses.**

So far as the line to Toledo is concerned, Company Exhibit 44 (R., 2907) shows a credit against operating expenses of $659,438.00 on account of the "differential charge to Northwestern Ohio Natural Gas Company," which credit to operating expense is made solely on account of the deliveries of natural gas to Toledo. This

reduces the price more than one cent per M c. f. on all gas delivered in the state of Ohio by The Ohio Fuel Gas Company. This single credit by itself more than offsets the return on the entire valuation of the line to Toledo and the line to the Indiana border, if no part of them were used, as they are, to help furnish service to Columbus.

So far as the court's statement:

> "By the preponderance of the evidence, the transmission lines north and northeast of Columbus do not contribute to the gas supply,"

this is contrary to the undisputed evidence in the record, and contrary to the unanimous finding of the commission. (R., 166, 194.)

At page 188, et seq., of our opening brief we have shown the sources of the gas, location of the wells and the location of the compressor stations.

The subject of allocation is far more complicated than the subjects of amortization and depletion, which latter subjects the court manifestly did not understand.

As shown by the article in the Michigan Law Review for January, 1934, quoted from at page 203 of our opening brief, and as shown by the quotation from the January, 1934, Yale Law Journal at page 34 of our opening brief, we are not alone in our belief of the lack of understanding by the court below of these subjects.

19. DEPRESSION LABOR COSTS—LABOR PERFORMANCE.

(City Brief, pp. 3, 25; Opening Brief, pp. 205, 224.)

On page 3 of the city's brief it is said:

> "This lowering of prices and the resultant reduction in the rate base and other values were not taken into consideration by the commission."

We most strenuously insist that this statement is not correct. The minority commissioner said (R., 207),

> "The city contended that some consideration should be given to the nature of the construction program and the lower cost of labor, which is recognized, both as of the date certain and to the present time. The trend of labor costs has been constantly downward since the date certain. The lower labor cost and labor performance as set out by the city are proper and should be applied in evaluating the distribution line equipment and service line equipment in this case,"

while the majority commission said (R., 171):

> "It might, however, be stated briefly that the entire commission is in substantial accord in accepting the material costs applied by the company and the labor cost and labor performance set up by the city."

In discussing the rate of return the majority commission said (R., 169):

> "This puts up to the commission a test which, under the present depression, is different from any that has heretofore confronted us."

Depression Labor Costs.

There is a fairly satisfactory way of demonstrating this lowering or trending of costs. In the case of The Columbus Gas & Fuel Company, Complainant v. The City of Columbus, Ohio, Defendant, in Equity No. 362, in the District Court of the United States, for the Southern District of Ohio, Eastern Division (17 Fed. [2d], 631, 638), appellant's property used and useful in supplying natural gas to consumers in the city of Columbus had been valued as of August 31, 1925. In Company Exhibit 19 (R., 2898) it is shown that between the date of the District Court's valuation and the date certain in the instant case appellant had made net additions at book cost, and exclusive of general overheads and going concern value, of $1,231,760.78 within the city. In Company Exhibit 186 (R., 3006A) we added these net additions to the District Court's valuation of August 31, 1925, applying the same rate for overheads and going concern as used by the District Court, and arrived at a cost of reproduction new of $6,254,906.41 as compared with the company's claimed cost of reproduction in Exhibit 2 (R., 2874) of $6,136,742.00, and a present or depreciated value of $5,354,317.27 (R., 3006A) as compared with the company's claimed present value of $5,284,529.00. (R., 2874.) Yet both the majority (R., 182) and the minority (R., 220) find a present value for appellant's property of only $4,027,647.00. In other words, the present value found by the commission for appellant's property is $1,326,670.00 (or approximately 25%) less than the value found by Judge Hough as of August

31, 1925, plus the net additions to December 31, 1929. In the instant case the company introduced the actual prices paid for labor as of the date certain (R., 499), the actual performances obtained from labor as of the date certain (R., 499), as well as a record or "clocking" of thirty-two similar construction projects carried on in the city of Columbus. (Exhibit 199, original.) Company Exhibit 201 shows the records of performance, gang set-ups, etc., of the job which the city's witness, Burgess, claimed to have used as his yardstick. (R., 3007, et seq.; R., 853.)

So far as the city's performance is concerned, a comparison of the Allensworth testimony and exhibits (City Ex. 66, R., 3037) with the LeFax or Wehrle tables (Co. Ex. 157-A-B-C-D, R., 2989 to 2996) will demonstrate that the Allensworth performance and gang set-ups were copied from the LeFax or Wehrle tables.

The LeFax or Wehrle tables were published in 1918 by George Wehrle, a Denver, Colorado, artificial gas man. His entire business life with no exception of moment had been spent in Denver. Up to the time of the publication of his tables it will be found that there was no wrought iron or steel pipe of any consequence in the Denver gas system. Allensworth's use of these tables destroyed his testimony, for in effect he was offering not any testimony based upon his own experience or knowledge but the statements of George Wehrle.

Mr. Allensworth himself never had a moment's experience in the natural gas industry or in any other work

which qualified him to give his testimony. (R., 435, 415, et seq.; see Opening Brief, pp. 259-260.)

Mr. Allensworth testified in reference to the LeFax or Wehrle tables (R., 375):

> "Q. You have used that publication in your work I believe? A. I don't know that I have used it. I have it in my possession and have referred to it from time to time."

At R., 376, appear the following question to and answer by Mr. Allensworth:

> "Q. Now will you look at page 44 on City Exhibit 66. I would like to have you investigate this same page of the LeFax publication and tell us whether or not the gang setup appearing on page 44 is not identical with the table for laying pipe set up on page 8-307 and the table for jointing pipe on the following page? A. It may be. If you say it is I will admit it. Why look it up. Let me look at your page. I will check it right here. Why should I look that up?"

Mr. Allensworth's embarrassment in respect of these tables is apparent. At R., 375, when Mr. Allensworth was first asked about the LeFax publication his answer was so faint that counsel for the city asked him to speak louder.

At R., 2486, Mr. Allensworth testified in answer to a question by counsel for the city as follows:

> "Q. (By Mr. Huffman.) How many cubic yards have you figured a man will excavate per day, Mr. Allensworth? A. Three cubic yards per man day of nine hours."

Depression Labor Costs.

In the LeFax or Wehrle tables (R., 2990) it is said:

> "**Trenching and backfilling**: It was decided that under average conditions a man would trench and backfill 9 cubic feet of trench per hour. * * *"

When Mr. Allensworth's attention was called to this comparison on cross examination, he replied (R., 376):

> "I do not know whether that is a 9 hour day or what it is."

It was immaterial whether LeFax referred to a nine hour day for it requires only a little mental arithmetic to see that nine cubic feet per man per hour would be 81 cubic feet for a nine hour day. There being 27 cubic feet in a cubic yard, the equivalent is the three cubic yards per man day of nine hours, used by Allensworth.

Laying and Jointing.

6 Inch Cast Iron B. and S. Pipe.

Allensworth.	LeFax Publication.
"1 Strawboss	"1 Foreman
2 Pipemen	2 Pipemen
1 Caulker	1 Caulker
1 Yarner	1 Yarner
1 Leadman"	1 Leadman"

City Exhibit 66, page 54 (R., 3037), Company Exhibit 157 A and B, Tables I and II (R., 2991).

Depression Labor Costs.

8 and 10 Inch Cast Iron B. and S. Pipe.

Allensworth.	LeFax
"1 Strawboss	"1 Foreman
4 Pipemen	4 Pipemen
1 Caulker	1 Caulker
1 Yarner	1 Yarner
1 Leadmann"	1 Leadman"

City Exhibit 66, page 45 (R., 3037), Company Exhibit 157 A and B, Tables I and II (R., 2991).

12 and 16 Inch Cast Iron B. and S. Pipe.

Allensworth.	LeFax
"1 Strawboss	"1 Foreman
6 Pipemen	6 Pipemen
1 Caulker	1 Caulker
1 Yarner	1 Yarner
1 Leadman"	1 Leadman"

City Exhibit 66, page 46 (R., 3037), Company Exhibit 157 A and B, Tables I and II (R., 2991).

20 Inch Cast Iron B. and S. Pipe.

Allensworth.	LeFax
"1 Strawboss	"1 Foreman
6 Pipemen	6 Pipemen
2 Caulkers	2 Caulkers
2 Yarners	2 Yarners
1 Leadman"	1 Leadman"

City Exhibit 66, page 47 (R., 3038), Company Exhibit 157 A and B, Tables I and II (R., 2991).

24 Inch Cast Iron B. and S. Pipe.

"1 Strawboss	"1 Foreman
8 Pipemen	8 Pipemen
2 Caulkers	2 Caulkers
2 Yarners	2 Yarners
1 Leadman"	1 Leadman"

City Exhibit 66, page 48 (R., 3038), Company Exhibit 157 A and B, Tables I and II (R., 2991).

6 Inch Wrought Iron and Steel Pipe (and Smaller).

"1 Strawboss	"1 Foreman
2 Layers	2 Pipemen laying pipe
2 Jointers"	2 Men jointing"

City Exhibit 66, page 49 (R., 3038), Company Exhibit 157 C, Tables Ia and IIa (R., 2993).

8 Inch Wrought Iron and Steel Pipe.

"1 Strawboss	"1 Foreman
4 Layers	4 Pipemen
3 Jointers"	3 Men jointing"

City Exhibit 66, page 50 (R., 3039), Company Exhibit 157 C, Tables Ia and IIa (R., 2993).

The LeFax Publication shows no crew set-up for wrought iron and steel pipe above eight inches. It will be noted, however, that at pages 51 to 56 inclusive of Allensworth's unit cost detail the number of men laying and the number of men jointing pipe are increased by Mr. Allensworth as the pipe sizes increase, in the same ratio as shown in the LeFax table for the smaller sizes of pipe.

difference between his figures

Allensworth said (R. 377):

The table that you were referring to includes a
. My understanding of what is
known to the trade as a strawboss or working fore-
.

(See page of Exhibit marked 157 B (R. 2801), the
Federal Administration uses the term "strawboss" and the
"foreman" interchangeably.

The cost data furnished by Mr Allensworth
(R. 2801 to 2811, inclusive; R. 2833, et seq.)
the number of feet per day which the above
and point of each kind and size of pipe
the Federal Administration sets up separate tables for
painting pipe, and Mr Allensworth combines
in his exhibit, some computation is
necessary in order to determine whether the two are
in this respect. This is necessary because the
Administration sets up separate performances per
for setting and painting. We made the com-
for six inch cast iron
pipe from Federal Table I and multiply by the three
men set up in the same table you get 42.15 feet of pipe
per hour. To lay one foot it will require 1 foot
divided by 42.15 feet equals .023724 hour.

Take the 4216 feet of pipe painted per hour, set
Federal Table II and divide by the three men set
same table you will get 1404 feet per man hour

Depression Labor Costs

To joint one foot it will require 1 foot divided by 16.64 hours or .060096 hour. Combining the two operations you have six men at nine hours per day equal 54 hours divided by .131270 (.071174 plus .060096) or 411.37 feet per day. Allensworth used 414 feet in Exhibit 66, page 44. By the same operation as to each kind and size of pipes the following results are obtained:

Cast Iron B and S Pipe	LeFax Publication	Mr. Allensworth
8 Inch	401.71	402
10 Inch	301.99	302
12 Inch	280.40	280
16 Inch	177.18	177
20 Inch	155.25	166
24 Inch	142.30	142
Steel Pipe	**LeFax**	**Allensworth**
1¼ Inch	2173.07	2173
1½ Inch	1871.34	1871
2 Inch	1403.97	1404
3 Inch	860.06	860
4 Inch	637.46	634
6 Inch	397.31	397
8 Inch	422.89	423

We asked Mr. Allensworth to make the computation and advise the commission whether the gang performance produced by the figures in the LeFax Publication were the same as those set out in his Exhibit 66. (R. 377.) He agreed to do so and reported at (R. 444) that they were identical. He then attempted to avoid

the natural inference resulting from the comparison by reading into the record another set of performance figures which he arrived at by including as a part of his gang the general foreman, night watchman and material clerk, which he had shown separately in City Exhibit 58, page 2. (R., 3118.) This was not a correct comparison, but was another effort to confuse. He apparently hoped the commission would overlook the fact that in the LeFax Publication on the page appearing at Record, 2995, it is specifically stated that the costs of general foreman, night watchmen, water boy, etc., are not included in the tables but are to be separately added.

Take out of the Allensworth exhibits the reproduction cost figures adopted from the company's appraisal; the items copied from the LeFax Publication and the instances in which it suited him to use the findings of Judge Hough in the federal court case (17 Fed. [2d], 630), and there is nothing of Allensworth left except a few places where he arbitrarily reduced the company's costs without any explanation of his reasons beyond his "judgment" and "opinion."

This case presents a striking example of what occurs when witnesses without actual experience to guide them undertake to make an appraisal. Mr. Allensworth presented in this case a detailed statement of the number of feet of pipe of each size which would be laid by a specified gang, figured out to odd numbers of feet. He had no experience upon which to base a judgment. In test-

ing his qualifications he was asked the source or basis of his figures. After claiming they were the result of his engineering knowledge and experience (R., 369), and at least twice denying the use of a hand book (R., 374, 377), he finally admitted that every performance figure in his exhibit as to trenching, backfilling and pipe laying checked to the fraction of a foot with figures in the LeFax handbook (R., 444) which he had used for some purposes in another case. (R., 375.) An inexperienced witness necessarily arrives at his figures by some such method. The experienced engineer not only does not need to resort to such synthetic bases, but knows the results are unreliable. (R., 459.) The company appraisal in this case was not made that way. The 2.58 yards per man day referred to at page 26 of the city's brief is a figure computed by the city. This figure was not used as the basis of the company's appraisal. The company appraisal was made entirely by men experienced in the particular kind of work involved. In addition to Strickler, who had been with the local plant since it started in 1889, there were more than a dozen other engineers, selected because of their special training in certain parts of the work. Their names, qualifications and subjects covered are in the record. (R., 314-331.) These men knew from actual experience the cost of installation of a given quantity of pipe or other property, and made their appraisals accordingly. It was to supply to the commission information upon which it could definitely de-

termine who was right that the actual check of all similar work then being done in Columbus was made. Notwithstanding this evidence was uncontradicted and showed that Allensworth's hand book performances could not possibly be realized, and that the company's figures were more than fair to the city (R., 2491-2496), no attention was paid to it and Allensworth's computed costs were adopted.

A few misstatements by counsel for the city will be here corrected. The company did not ignore the difference between wholesale and piecemeal construction, as stated at page 26 of the city's brief. On the pages cited in support of that statement, to wit (R., 2498-2500), Mr. Ferguson completely refuted that claim, and explained why the appraisal would have been higher if the company's piecemeal costs had been used. The company did not ignore its own experience. The judgment used by its witnesses was the result of that experience, and in the check observations will be found the gas company's experience along side that of the telephone company, the water works and independent contractors. (Co. Ex. 199.) The company did not undertake to compare dissimilar work. What was compared and shown by the testimony and exhibits was the performance of men digging, backfilling and tamping dirt in trenches.

The labor rates allowed were founded upon depression or trend conditions. The commission used a 40¢ common labor rate. On December 31, 1929, the gas company was paying 45¢, the city of Columbus was paying 50¢.

(R., 499.) Both the commission and the court said in their respective opinions that they had given consideration to the depression. (R., 64, 169, 206, 207.)

We can see no other meaning in the following quotation from the opinion of the minority commissioner:

> "The trend of labor costs has been constantly downward since the date certain. The lower labor costs and labor performance as set out by the city are proper and should be applied in evaluating the distribution line equipment and service line equipment in this case."

20. GAS HOLDER.

(City Brief, p. 29; Opening Brief, p. 205.)

James P. Strickler started with the gas company in Columbus in 1889. He was inspector on the distribution lines as they were installed and was in charge of the meter department until 1904 when he became superintendent. He continued as superintendent of The Columbus Gas and Fuel Company until he retired in February of 1930. (R., pp. 332-333.)

In respect of this gas holder Strickler testified as follows (R., 2513, et seq.):

> "Q. Are you familiar with this holder that we have been talking about this morning here? A. I am.
>
> Q. Do you know whether it has been used? A. I do.
>
> Q. What is the fact as to its use? A. The holder was tied into The Columbus Gas & Fuel's natural gas system in the year 1912, I believe it was or thereabouts. Let me see. 1913.

Q. You say it was tied in in 1913? A. And used as a relief measure during peak loads ever since that time.

Q. Now, just to clear us all up on that, Mr. Strickler, I think there have been some impressions traveling around here that the holder was turned on and off at times; is that true? A. That is correct.

Q. Now, when would it be turned off? Any particular parts of the year? A. In the summer time the holder is not used at all.

Q. And what times of the year is it used? A. I can give you the exact dates it was used last year. Pardon me. I have it here.

Q. All right, do that for us. A. I have a record here and also the charts which will verify the statement in case you want to use them as an exhibit.

Q. Now, before you read your tabulation there, tell us about these charts that you have? How are they made? A. They are made by a recording implement.

Q. Where is that recording implement located? A. In the office of The Columbus Gas & Fuel Company.

Q. With what is it connected? A. To the low pressure system.

Q. To the low pressure system? A. To the low pressure system at the office.

Q. What relation does it bear to the holder, if any? A. It is connected directly to the low pressure lines leading to the holder.

Q. Does this Bristol record pressure gauge graph show the use of the holder? A. It does, that is, the periods in which it was used.

Q. Now, that is an automatic registering instrument such as is used regularly by gas companies? A. It is.

Q. Just give us the result of those registrations.

A. During the year 1929 and '30—no, '29 on January 8 it was used for six and three-fourths hours.

Q. You say 'it.' You mean the holder? A. Yes, when I refer to 'it' that is what I mean. January 15, it was used seven hours; January 16, it was used six and one-fourth hours; February 7, it was used three and one-fourth hours; February 19, it was used three and one-fourth hours; February 20, it was used six and one-fourth hours; and on February 21, it was used fourteen hours. The length of period in which the holder was used depending on the temperature on those dates.

Q. Now, I wish that you would explain to the commission the function of the holder? Is it a stabilizer of pressure? If so, why is such a stabilizer of pressure required? A. I would not say that it was used as a stabilizer. It is used more to build up the low pressure system during peak loads caused by the demand on the system by the consumption thereon, the gas from the holder being driven into the mains by a blower, centrifugal force, operated by an electric motor.

* * * * * * * * * * * *

Q. What would be the effect upon the service to consumers if the company did not have that holder, did not have and use that holder? A. We would have had a great many complaints in what we would call the downtown district, and ranging anywhere from Pearl and Columbus street on the south to Washington avenue and Noble alley on the southeast, to Jefferson avenue and Buckingham on what would be the northeast of that section, and to the railroad track directly north, the holder having a direct effect on that territory.

Q. From your long experience with the company, what do you say as to whether or not that holder is a useful mechanism for the purpose of distributing

gas in Columbus? A. In my estimation it is very valuable.

Q. What is the fact as to whether if the company did not have that holder it would have to have larger mains? A. I think that is true.

Q. More expense would have to be put upon the mains if they didn't have that? A. I think that is true.

Q. And that is needed only a part of the year, is it not? A. That is true.

Q. And then a part of the days of the year during your peak loads? A. Yes, sir.

By Chairman Geiger: Q. You mean that you use it every day of the winter season? A. No, sir.

Q. Only the days that you have read? A. Just these days that I have read, when the peak load is on, and the demand for gas is great all over the country, and there being an insufficient delivery to the city to take care of our peak loads during those hours, this is a reservoir with which we have supplied them at that time.

Q. If we would compare those days on which it is used, you would find they would be the days on which the weather was severe? A. Yes, sir.

Q. And days, even though it be in the winter time when the weather is not so severe, you do not call upon it? A. Do not need it because of the adequate supply.

Mr. Turner: Then it would be regulated not only by the temperature but by the failure of the supply company to have pressure for some reason or other.

The Witness: That is true.

Chairman Geiger: Sort of a safety valve is what you might call it?

The Witness: Yes, sir.".

21. GENERAL OVERHEADS.

(City Brief, p. 69; Opening Brief, pp. 148, 206.)

The effort here is to persuade the court that these are some kind of theoretical or contingent costs which may or **may not** be incurred and are added merely as a factor of safety. This is not the case. They are all as much actual and unavoidable as the price of a piece of pipe or the wages of a laborer. The difference is entirely in the form of setting them up in an appraisal, and not in the substance.

Because of their nature they are items upon which the testimony of experienced witnesses is the best criterion, and concerning which such evidence should control. That the commission and the court allowed only 14% on the production and transmission property on the testimony of a witness without experience, and only 12½% on the distribution property, with no supporting evidence, is just another indication of the attitude of the commission and court toward this case. They overlooked no opportunity to cut down the valuation. The reason advanced for the reduction in the case of the distribution property, to wit, that the construction period was longer, is patently erroneous, since only one year's interest and taxes were claimed or allowed in either case.

The majority commission allowed nothing in its general overheads for taxes during construction. (R., 165.) The minority commissioner allowed 1.8% for "law ex-

penses, injuries and damages, and taxes during construction." (R., 198.) Counsel for the city state at page 90 of their brief that the tax rate in Columbus in 1929 was 2.30 per $100.00 of valuation or 2.3%.

The argument that there is duplication, by overheads being allowed on overheads, advanced several times in the city's brief, is just absurd. Their own engineers followed the same practice, which is the usual one, and they should have been able to tell counsel that there is no such result.

22. WORKING CAPITAL.

(City Brief, p. 78; Opening Brief, pp. 148, 206.)

Appellant's working capital was cut down because it purchased its gas from Ohio Fuel. Ohio Fuel's working capital was cut down because it purchased part of its gas from others. The commission assumed that credit was plentiful.

The company's estimate was based upon its actual requirements. (R., 2797, 1758.) While the commission in other cases had apparently found no difficulty in agreeing with experienced witnesses that approximately 5% of the valuation of the physical property should be allowed for working capital, it suddenly decided in this case without any competent evidence, to reduce this allowance $1,000,000. We assume now that counsel concede that in any recomputation of the rate, working capital should be included at $2,690,000 for The Ohio Fuel

Gas Company. We had assumed that since the court had approved the minority commissioner's conclusions, it had accepted his figures, to wit, $1,700,000. (R., 216.) The court made no specific findings or computations, hence we have used the minority commissioner's figures as being those of the court.

23. TAXES.

(City Brief, p. 89; Opening Brief, p. 208.)

We would not object so much to counsel's references to matters for which no errors have been assigned in this court, if the statements upon which their arguments are based were accurate. The methods of allocating the property and expenses as between customers inside and outside the city of Columbus, were not questioned by the city before the commission, or in the court below. In view of this fact, and that there was no assignment of error thereon in this court, the evidence in respect thereof was not included in the record here by either side. If the court is interested in the facts, the item of property taxes was allocated to customers inside and outside of Columbus on the basis of the location of the property, and not on the basis of gas sold. The excise tax was allocated on the basis of gas sold because it is a tax based on the gross receipts from the sale of gas and has no relation to the amount or value of the property.

The quotation from the minority opinion on page 91 of the city's brief is misleading without the proper explana-

24. LOAD BUILDING EXPENSE

(City Brief, p. 95; Opening Brief, p. 218.):

Counsel for the city refuse to recognize the difference between the sale of gas appliances, none of which is done by appellant, and for which we make no claim, and load building expense, which was and is necessarily incurred by appellant and should be provided for in its rates. The fact that appellant uses part of the time of The Gas & Electric Appliance Company's salesmen, and pays that company for their services does not alter the facts. A discussion of appliance selling or merchandising is beside the point. None is done by appellant and no claim is made therefor.

25. GAS SALES AND LOST GAS

(City Brief, pp. 99, 100.)

While these two points were included in our assignment of errors and made part of our petition for appeal, they were not included in the specification of errors to be relied on in our opening brief. While the facts showing the errors in both these points are in the record, for the sake of brevity and the avoidance of confusion, the figures in the table in our opening brief are all based on the sales and lost gas computations introduced by the city and used by the commission and court below.

26. COLLAR LEAK CLAMPS.

(City Brief, p. 101; Opening Brief, p. 219.)

On this subject counsel for the city merely carry into their brief the erroneous assumption made by the commission, and not corrected by the court below. If the clamps represented by this item of expense had been included in the rate base and a return allowed thereon, of course the item should not be allowed again as an expense. They were not included in the rate base, and they do constitute a necessary and continuing expense. We have made this clear in our opening brief (p. 219).

CONCLUSION.

It is therefore respectfully submitted that for the reasons specified in the assignment of errors which we have urged (Opening Brief, 20), the judgments of the court below in this consolidated case should be reversed or modified by this court in accordance with the record evidence and law applicable thereto.

Respectfully submitted,

EDWARD C. TURNER,
ALBERT M. CALLAND,
Counsel for Appellant.

Columbus, Ohio, March 10, 1934.

Edward C. Turner

Albert M. Calland